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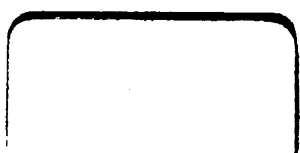
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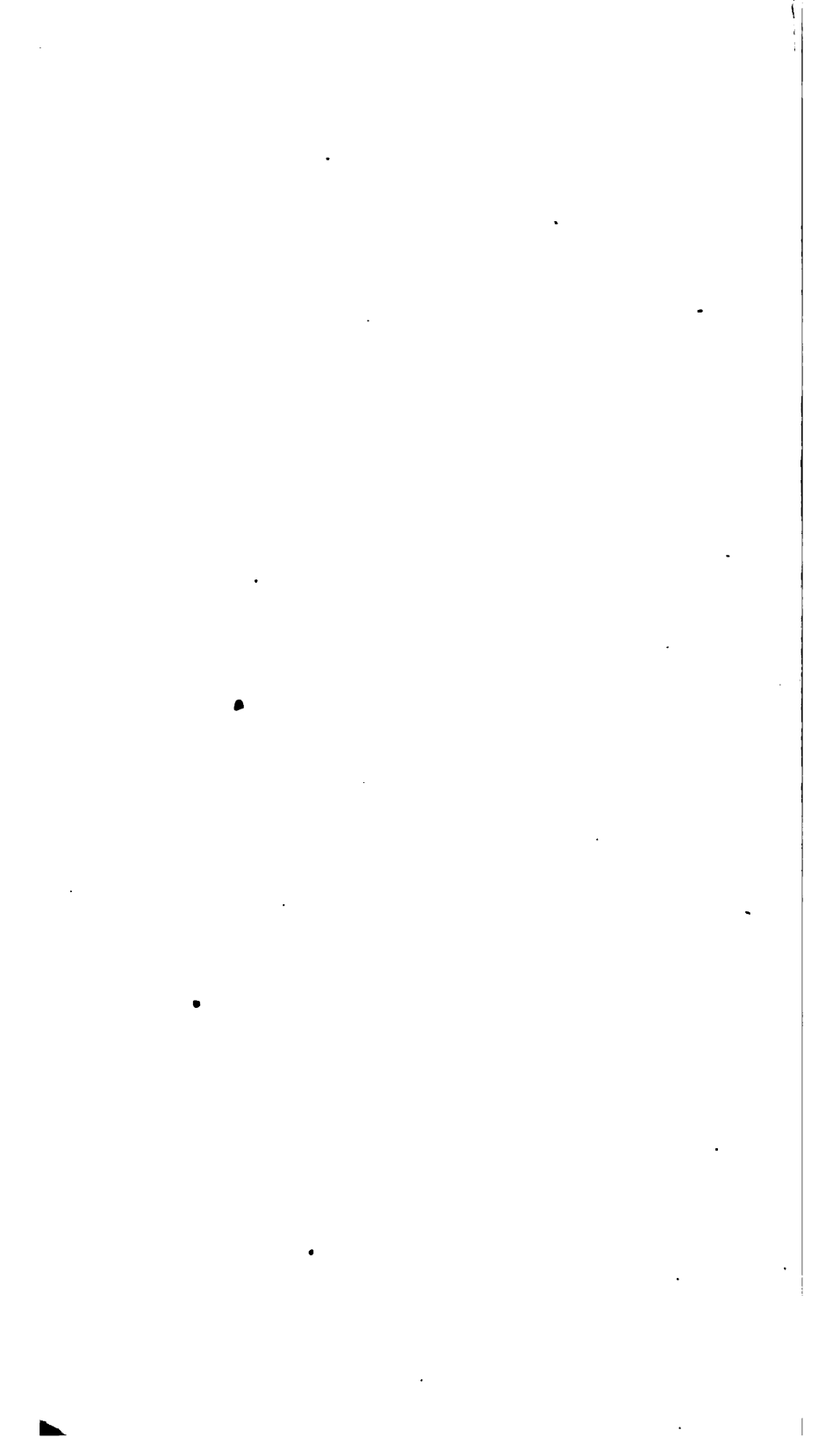
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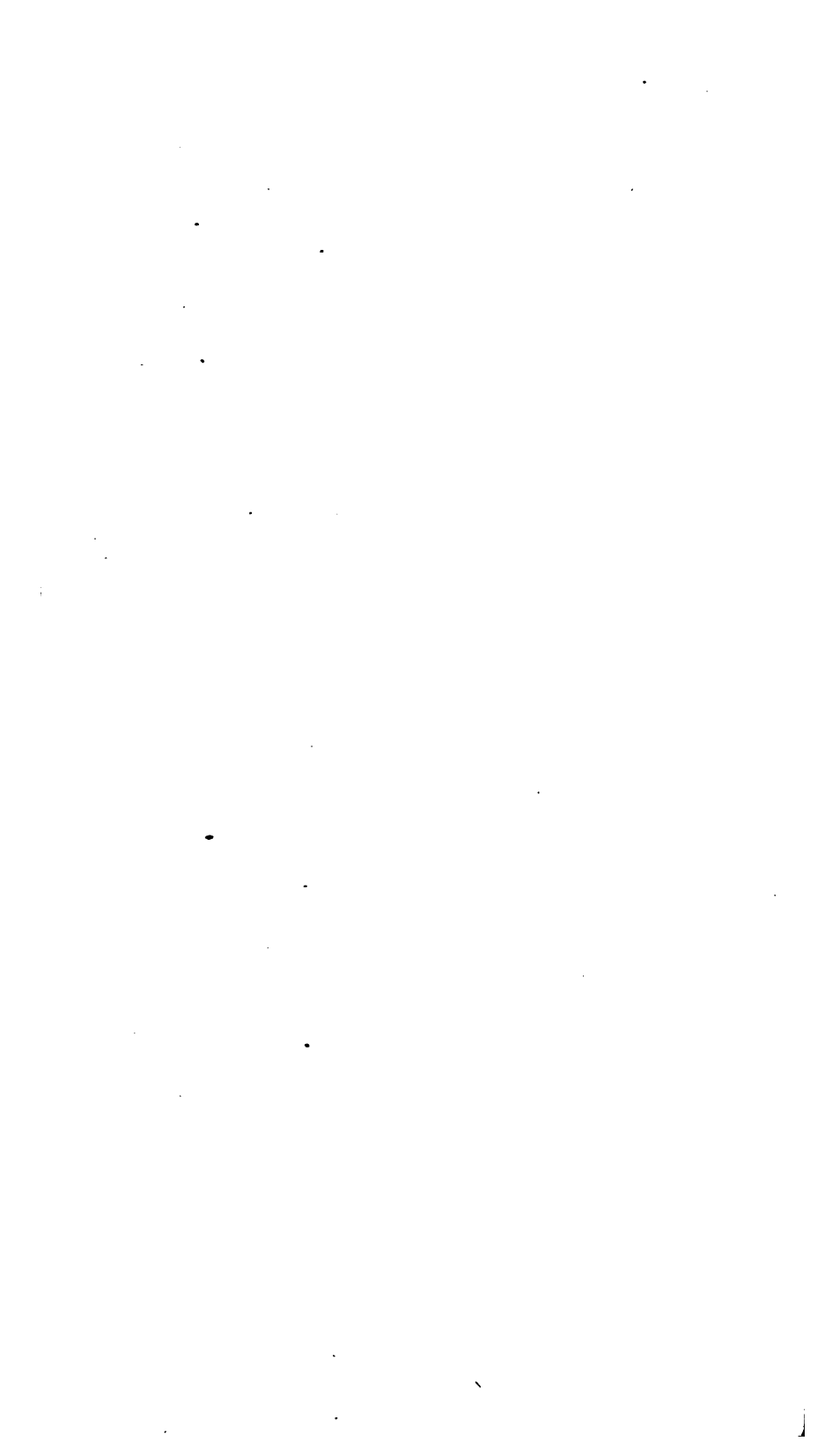
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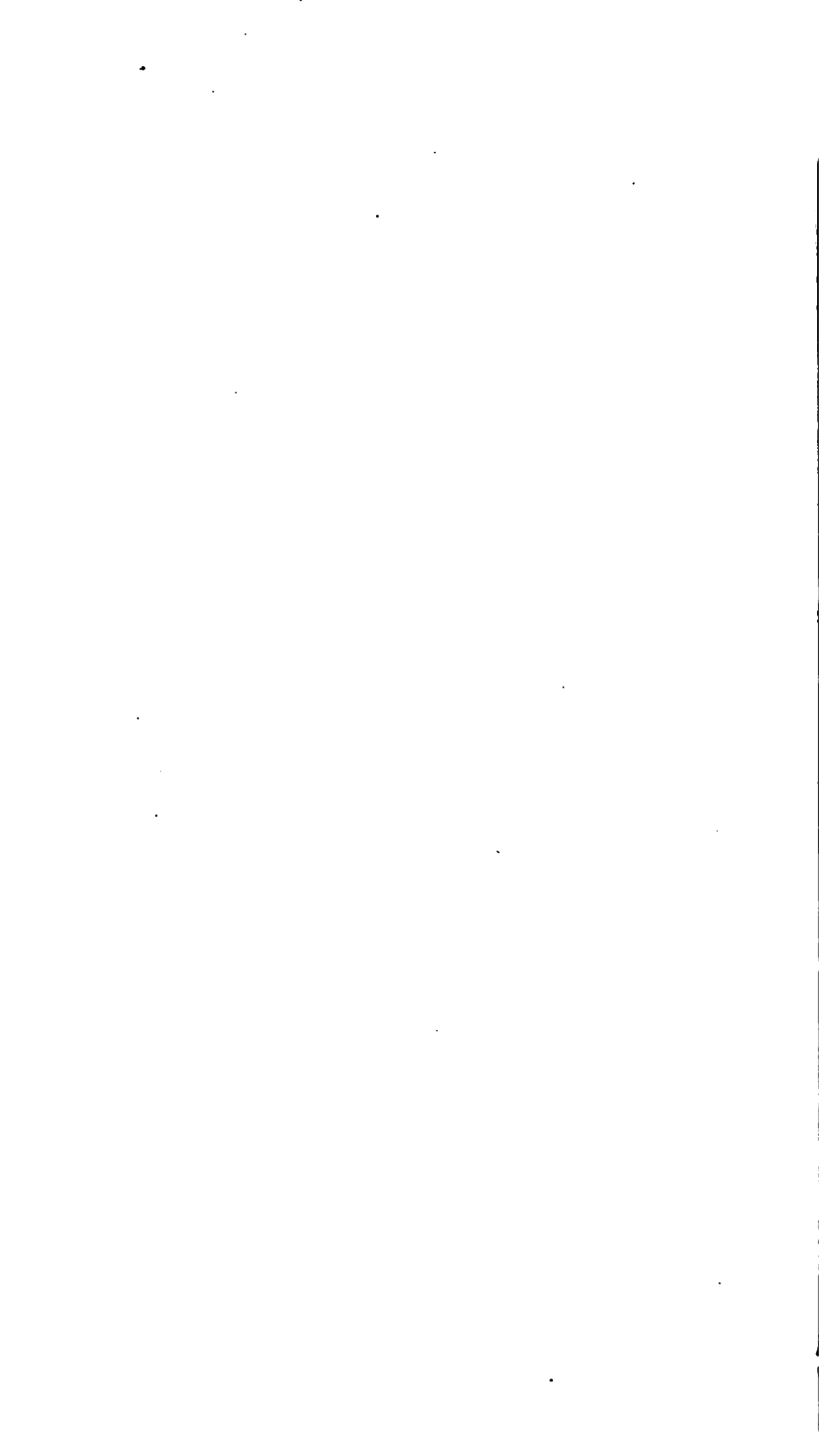














THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1880.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGEMENT,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

Vcl. XV.

SAN FRANCISCO:
BANCROFT-WHITNEY CO.
LAW PUBLISHERS AND LAW BOOKSELLERS.
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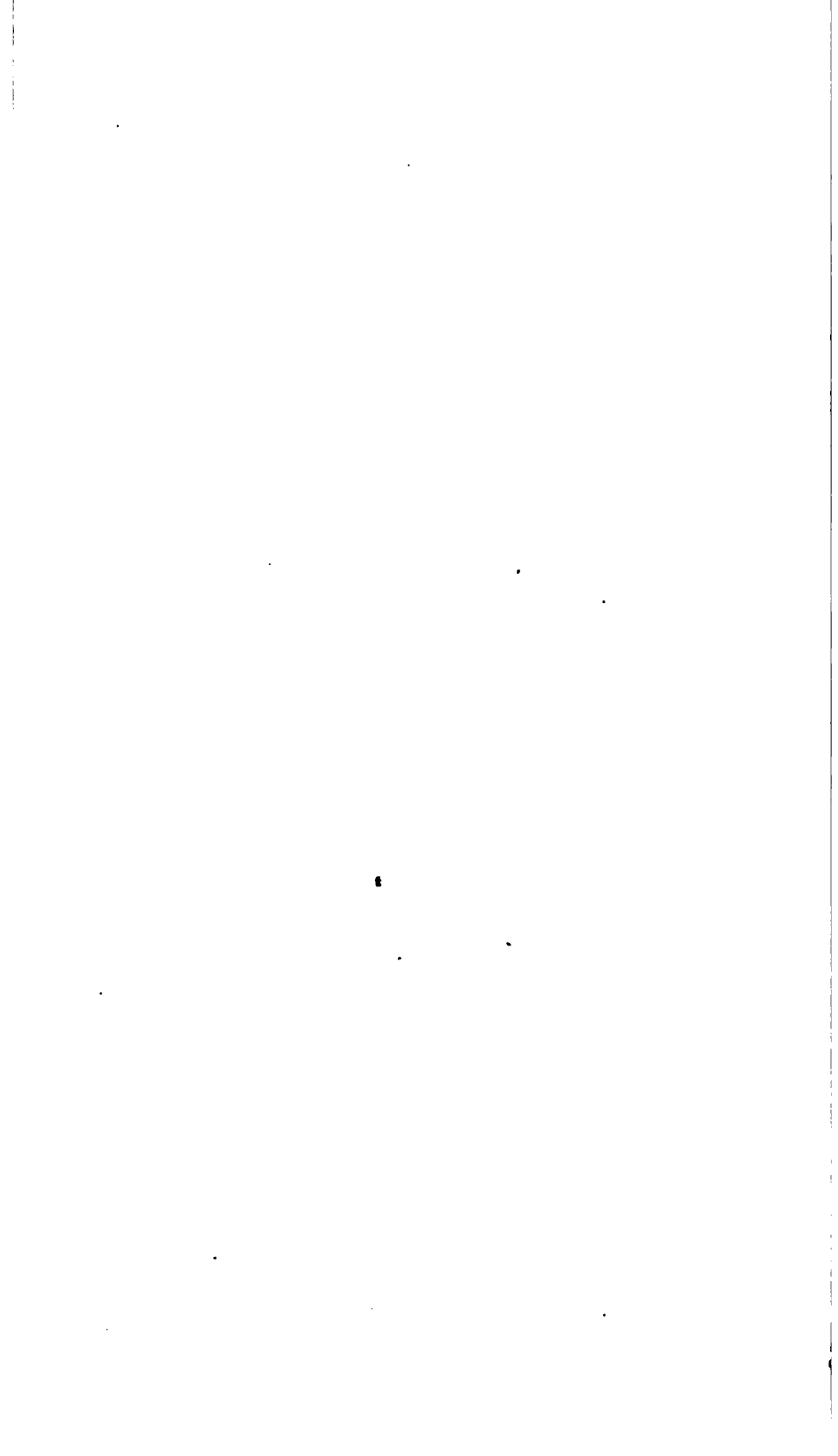
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AMERICAN DECISIONS.
VOL. XV.



CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

TUTT v. BROWN.

[5 LITTELL, 1.]

IF AN AGENT CONTRACTS WITHOUT DISCLOSING HIS PRINCIPAL, the latter may maintain an action on the contract, subject, however, to any set-off or defense which existed against the agent before the principal was disclosed.

ASSUMPSIT. The opinion states the case.

J. J. Marshall, for the plaintiff.

Monroe and Sharp, contra.

By Court, OWSLEY, J. George H. Tutt, the son of the plaintiff, Hansford Tutt, whilst in the service of his father, and for his benefit, contracted with the defendant, Brown, to transport in his father's wagon, a quantity of bagging to Colonel Pearce, near Huntsville, at a stipulated price to be paid by the said Brown; and in pursuance of his undertaking, the said George H. Tutt actually transported, in the wagon of his father, the bagging, and delivered the same on the farm of Colonel Pearce, near Huntsville. While contracting with Brown for the transportation of the bagging, nothing was said by George H. Tutt about his being employed in the service of his father, nor does it appear that Brown, at that time or for some time after the bagging was transported to Pearce, knew that the service was performed by the son for the benefit of his father. Brown failed to pay the said George H. Tutt the price agreed to be given for transporting the bagging, and this suit was brought in the name of Hansford Tutt, the father, to recover the price. On the trial in the court be-

low, after the preceding facts were in substance proved, the jury were instructed by the court that the plaintiff had no cause of action; but that the right of suit was exclusively in the son, George H. Tutt. Whether or not the court was correct in so instructing the jury, is the only question presented for the decision of this court.

That, in moral justice, the plaintiff is entitled to the price agreed to be paid by Brown for the transportation of the bagging, is a proposition that none, it is presumed, will pretend to controvert. The service, though performed by George H. Tutt, the son, was not for his own benefit, but for the benefit of the plaintiff, and in justice the plaintiff is most indisputably entitled to the amount which was agreed to be paid by Brown. Being, therefore, entitled to the price, it would seem to follow as a necessary consequence, upon general principles, that the plaintiff is entitled to maintain an action to recover it; for it is well settled, that as a general rule the right of property draws with it the right of action. The right of the plaintiff to maintain his action would be undeniable if, at the time of contracting for the transportation of the bagging, the son had made known to Brown his true character as agent, and the promise of Brown had been to pay the price to the plaintiff. In that case the contract of Brown, though made with the son, would, in a legal sense, be considered a contract with the father, and of course, the father's right to sue for a violation of the promise of Brown would be unquestionable. But, at the time of making the contract with Brown, the circumstance of the son being in the employment and acting for the benefit of the father, was not made known to Brown; and the question arises, whether or not that circumstance affects the right of the father to maintain his action. The circumstance of the son's failing to disclose his true character, certainly does not affect the justice of the father's claim for the price agreed to be paid for the service. If the price had been paid by Brown to the son, the son would be responsible for the amount, and the right of the father to the price must be admitted to be the same before it is paid to the son, that it would be after received by him. By failing to disclose his true character, the son may have imposed upon himself a personal liability to Brown, which he would not otherwise have been subject to; but he cannot have thereby deprived the father of the price agreed to be paid by Brown for transporting the bagging. The right of the father to the price is nevertheless the same, and for a violation of that right by

Brown, the law must be admitted to afford him a remedy. The remedy which the law affords does not, however, deprive Brown of any defense which he might have against the demand, considered as belonging to the son; for, having contracted with the son without a knowledge of his true character of agent, Brown should be permitted to consider him as principal, so as to allow him to avail himself of any defense to the action by the principal, that would have been admissible against the claim, if asserted by the son. Thus, in an analogous case, Lord Mansfield observed: "Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal." Paley on Agency, 253.

It is, therefore, the opinion of the court, that the court below erred in its instructions to the jury, and that the judgment of that court must consequently be reversed, with costs, the cause remanded and a new trial there had.

YANCEY v. DOWNER.

[5 LITTELL, 8.]

JUDGMENT—RELIEF IN EQUITY.—A court of equity has no power to set aside a judgment at law; it must act on the person only and not on the common law proceedings.

RELIEF IN EQUITY AGAINST A JUDGMENT WILL BE GRANTED, where by fraud or by an artful contrivance, or by any unavoidable accident a valid defense is kept out of sight.

RELIEF IN EQUITY AGAINST A JUDGMENT WILL BE DENIED, unless it appears that it was out of the power of the applicant, to make his application to the court of law in due time.

A MISTAKE OF COUNSEL in not moving for a new trial, or of defendant in calculating when the trial would be reached, is no ground for relief in equity.

IMPROPRIETIES OF JURORS, in conversing with other persons while deliberating on their verdict, will not justify a court of equity in granting a new trial at law.

TRESPASS. The opinion states the case.

Crittenden, for the plaintiff.

Sharp, contra.

By Court, MILLS, J. Yancey, in an action of trespass for breaking his close and house, and beating and wounding his slave, so that she was confined and useless for many months, recovered against Downer a verdict and judgment for five hundred and fifty dollars, from which Downer appealed and entered into an appeal bond, but never prosecuted the appeal, and afterwards filed this bill with injunction, praying the chancellor to grant him a new trial. The chancellor decreed a new trial, and to reverse that decree, Yancey has prosecuted this writ of error.

The grounds of equity set up by Downer, are, that at the time of the trial he was necessarily absent in Virginia on indispensable business, from whence he expected to return before the trial, but was unavoidably detained; that as a measure of precaution, he employed an agent to attend to the suit, who caused all the proper witnesses to be subpoenaed, and he and the witnesses attended on the day on which the cause was set for trial, and also the next day; and as there were several important causes still before his, the conclusion of his counsel, agent and witnesses, was, that the cause would not be tried the fourth; but that these causes were unexpectedly continued, and his cause was tried on the third day; and that owing to sickness, his agent did not get into court until after the cause was argued, and none of his witnesses were sworn and heard, and none of them appeared until after the jury retired, when one of his most important witnesses came in; that his agent spoke to his counsel about a new trial, and the counsel advised an appeal, as the most sure method of redress, and not a new trial, and the appeal was prayed; that if he had a fair trial, he could show that he had not injured the slave of Yancey to the value of one dollar, as he had only moderately chastised her, and the injury which she received was by a fall which happened by her running out of the kitchen in a passion. In an amended bill he states, that the son and agent of Yancey, who conducted the cause for him, had considerable conversation with the jurors, or some of them, after their retirement, and before they agreed on their verdict, of which neither he nor his agent was apprised, until long since the transaction took place.

Yancey, in his answer, denies any unfairness on his part, and alleges when the cause was reached, the counsel of Downer urged trial, and his own counsel proposed a continuance, or to lay it over until the witnesses appeared, as none of them were present, and thus Downer's counsel hoped to compel a nonsuit;

that against the wishes of his counsel, a jury was impaneled, and some of his witnesses then appeared, and the cause progressed without some of his witnesses, and the most important witness he had. He denies the possibility of mitigating the damages, and any knowledge of communications to the jury from his son, and pleads and relies on the proceedings at law, and the failure to apply for a new trial to a court of law as a bar to relief.

We could not sustain the decree of the court below, if the merits of the cause were in its favor. It directly sets aside the judgment at law, and awards a new trial *totidem verbis*. We cannot concede to the chancellor the power of setting aside and altering the records of a court of law. If the powers of a chancellor were separated from the person of the judge of a court of law, which is done elsewhere, and may be done here, we cannot tell how the chancellor would enforce such a decree; whether he would re-try the cause himself, or compel the court of common law to do it. Hence, this court has decided that the chancellor must in this case act on the person only, and not on the proceedings at common law; or, in other words, he ought to decree that unless the defendant in chancery consent in the common law court to a new trial, in a reasonable time, his hands shall be tied, and he be perpetually restrained from executing his judgment. But we do not rest on this point only in reversing this decree; for on the merits it cannot be sustained. Indeed, if the fact of improper communication with the jury be excepted, the face of the complainant's bill cannot authorize the interposition of the chancellor. The trial of torts belongs not to the chancellor, and he but seldom ought to interfere with the proceedings at law in such cases. Where by fraud or any artful contrivance of one party, or by unavoidable accident, a valid defense is kept out of sight, the chancellor may interpose. But it is not sufficient for the party applying to a court of equity for a new trial to exhibit good ground; he must also show that it was out of his power, owing to some substantial cause, to make the application to the court of law in due time. Besides, it ought clearly to appear that injustice had been done. Here the party has not shown it probable, that a different result would be produced on a second trial, even if the testimony of the witness, who alone appears to have been with him when he committed the trespass, and on whom he chiefly relies, be taken as conclusive. It does not appear that both his agent and counsel had it in their power to apply

for a new trial, and conversed upon it; that they were possessed of every fact in the bill, the communication with the jury excepted, then as well as now; and that they declined it, and took another course. By their decision he must be bound so far as the rights of his adversary are concerned. As to his absence, he could and did act by agent; and as to the conclusion that the case would not be tried, as this was not induced by his adversary, the result of it must fall upon him; for it would be going far to say that the organs of the law should be bound to re-try every case where parties had made calculations from the state of the docket, that the cause could not be reached in a certain time, and resting on that calculation, have missed the hour of trial. Those who rest on such calculations, must generally do it at their peril, and courts of law will scarcely ever relieve them, much less the chancellor.

As to the improper communications from the son and agent of the plaintiff in error, the proof amounts simply to this: At the place of trial there was no court-house, and the jury deliberated out of doors, and not having agreed until evening, they retired to a room prepared for them. One of the jurors on passing the son of the plaintiff, in the street, told him that his father's nearest neighbors on the jury were the hardest against him, or were for the lowest damages, to which the son made no reply. Another juror coming shortly afterwards, spoke to the son in nearly the same words with the first, to which the son replied that the first juror (naming him) had told him all about it, or that he had heard as much from the first juror, and here the conversation ended. It cannot be pretended that this ought to vitiate the verdict. The impropriety was all on the part of the jurors, and however imprudently they may have acted in such communications, or subjected themselves to punishment, there is no pretext for attributing any impropriety to the son of the plaintiff. He made no other reply than to intimate to the second juror, when troubled with such repeated addresses, that he wished to hear no more. Improprieties in jurors will frequently subject them to punishment, and not affect their verdict.

The decree must therefore be reversed with costs, and the cause be remanded, with directions there to dissolve the injunction with damages, and dismiss the bill with costs.

CONTROL OF EQUITY OVER JUDGMENTS AT LAW.—Courts of equity disclaim any right or intention to interfere in any way with the judgments or other proceedings of a court of law. They act upon the parties to actions at

law by restraining them by injunction, but they do not undertake to exercise any supervisory power over the proceedings of the courts themselves: *Richardson v. Mayor and City Council of Baltimore*, 8 Gill. 433; *Contee v. Cooke*, 2 Harr. & J. 179; *Blight's Heirs v. Tobin*, 7 Monr. 616. In the case of the *Farmers' Bank of Kentucky v. Collins*, 13 Bush, 138, the court say: "Courts of equity have always relieved the judgment-debtor against execution sales when tinctured with fraud or unconscientiously oppressive. This is done, not by setting aside the sale or cancelling the return of the sheriff, but by treating the purchaser as holding the title in trust, and compelling him to reconvey upon the performance of such equitable conditions by the judgment defendants as the chancellor may find proper to impose. But we are aware of no case in which a court of chancery has undertaken to cancel, or correct, or in any way modify, the records of a common law court, in order to enable a judgment creditor to enforce his common law judgment. The dockets of the two courts are, in law, separate and distinct, even where they are presided over by the same judge, and the writs issued by each, and the acts of the ministerial officers under them, must be set aside or annulled by the court from which they issued." See, also, *Story's Eq. Jur.*, sec. 875, 1570, 1571.

Courts of equity do not relieve against a judgment at law merely on the ground that it was erroneous: *Turpin v. Thomas*, 3 Am. Dec. 615. Neglect to make a defense at law is a bar to equitable relief: *More v. Bagley*, 12 Id. 144. Where a defendant has an adequate defense at law, but is prevented from making it by the fraudulent representations of the plaintiff, equity will relieve against the judgment: *Poindexter v. Waddy*, 8 Id. 749. A court of equity will grant relief against a judgment at law for money won at gaming, where the judgment was by default: *Clay v. Fry*, 6 Id. 654. On the effect of improper conduct of jurors, see note to *Dana v. Roberts*, 1 Id. 37.

HORD v. WALKER.

[5 LITTELL, 22.]

VENUE OF ACTIONS.—Land lying out of the county cannot be recovered in an action in the circuit court.

ENTRY TO STOP STATUTE OF LIMITATIONS.—If a tract of land lies partly in two counties, and is held adversely to the owner, his entry on the part in one county does not stop the running of the statute as to the part in the other county.

EJECTMENT. The opinion states the case.

Crittenden and Talbot, for appellant. No attorney for the appellees.

By Court, OWSLEY, J. This was an ejectment brought in the circuit court of Fleming county by Hord, to recover the possession of and which is common to two patents; the one of which Hord derives title through, and the other, though of junior date, is claimed under by Walker, etc. The land which is common to the patents lies part in the county of Mason and

part in the county of Fleming, and the plaintiff Hord recovered a verdict and judgment against the defendants, Bodley and Brown, for so much of the land in contest as is in their possession and lies in the county of Fleming; and the other defendants recovered a general verdict and judgment against Hord. The questions presented for the decisions of this court grow out of bills of exceptions taken by Hord on the trial in the circuit court.

The defendants relied upon an adverse possession for upwards of twenty years, and introduced evidence to prove that each of them had entered upon their respective parcel some time in 1792 or 1793, and that they had continued thereon ever since. The plaintiff, Hord, then proved that some time in 1804 he entered upon that part of the land common to both patents, which lies in the county of Mason, and improved the same by clearing six or seven acres, and that he has continued in possession thereof ever since. After the evidence was thus introduced, the court, on the application of the defendants, instructed the jury that the entry and occupancy of Hord in the county of Mason, did not prevent the running of the statute of limitations against him, as to that part of the land which lies in the county of Fleming; and that although, under all the circumstances, the jury might be of opinion the statute of limitations would not bar the plaintiff's action, yet he could not recover in this suit any part of the land which lies in the county of Mason.

In thus instructing the jury, we think the court decided correctly. It was undoubtedly correct to inform the jury that in this action the plaintiff could recover no land in the county of Mason. The action was brought in the county of Fleming, and being in its nature local, there can of course be no recovery of any land which lies in any other county. And if no land out of the county of Fleming can be recovered in an action brought in that county, it necessarily follows that the court was correct in instructing the jury that the entry and occupancy of the plaintiff Hord, in the county of Mason, did not stop the running of the statute of limitations as to the land which lies in the county of Fleming; for wherever a person has been ousted of his possession, it is a settled rule, that to regain the possession by entry, the entry must pursue the action for its recovery. "Thus," says Lord Coke, "the entry of a man to re-continue his inheritance or freehold, must ensue his action for the recovery of the same; as if three men disseise me, severally, of three several acres of land, being all in one county, and)

enter into one acre, in the name of all three acres, this is good for no more but for that acre which I entered into; because each disseisor is a several tenant of the freehold, and as I must have several actions against them for the recovery of the land, so mine entry must be several." And again he observes: "If the land lies in several counties, there must be several actions, and consequently several entries:" Co. Lit. 252 b.

The judgment must, therefore, be affirmed with costs.

LOFLAND v. EWING.

[5 LITTELL, 42.]

AN EX-SHERIFF MAY, AFTER going out of office, whether by resignation or by the expiration of his term, sell property levied upon by him while in office.

THE DEPUTY OF A SHERIFF who levied upon property while in office, may, with or without a *venditioni exponas*, sell the property after the sheriff has gone out of office.

THE DIVISION OF A COUNTY, after a levy upon lands, does not deprive the officer making the levy of authority to proceed with the sale.

IMMATERIAL EVIDENCE is properly rejected.

EJECTMENT. The opinion states the case.

Crittenden and Bibb, for appellant.

Sharp, contra.

By Court, **BOYLE, C. J.** This was an action of ejectment on the demise of Thomas M. Ewing, against Smith Lofland. On the trial in the circuit court, the lessor of the plaintiff, after deducing title from the commonwealth to Lofland for the land in controversy, produced in evidence the records of judgments in debt against Lofland, and executions of writs of *fieri facias*, with the return of D. W. Poor, deputy sheriff of Urbin Ewing, sheriff of Logan county, that he had levied the same upon the land in dispute, which remained unsold for want of time; writs of *venditioni exponas*, which issued in consequence of said return and the deed of the said Poor, as deputy of Urbin Ewing, made to the lessor of the plaintiff as the purchaser at the sale of the land under the executions. The deed from Poor, as deputy sheriff, contained besides the usual recitals a stipulation "that he was not liable, in case the sale should be illegal, on account of the resignation of Urbin Ewing, late sheriff of Logan county, or on account of part of said land being and lying in

the county of Todd, which has been stricken off from said county of Logan by a line run since the levy of said execution upon said land." To the reading of this deed in evidence the defendant objected; but the court overruled the objection, and permitted it to be read.

The lessor of the plaintiff thus proved by the said deputy sheriff, that the defendant gave up the said land and directed him to levy the executions thereon, which he did as deputy sheriff of Urbin Ewing, who was then high sheriff of Logan county, and that the defendant had the possession thereof at the time of the service of the declaration in this cause.

This being all the evidence on the part of the lessor of the plaintiff, the defendant moved the court to instruct the jury as in case of a nonsuit; but the court overruled the motion. The defendant then offered to prove that Urbin Ewing had resigned his office of sheriff before the sale of the land by his deputy, and even prior to the emanation of the *venditioni exponas*, and that he had since his resignation given to his deputy no new authority nor directions to sell; but the evidence being objected to on the part of the lessor of the plaintiff, the court sustained the objection. A verdict was found for the plaintiff, and the defendant moved the court for a new trial; but the court overruled his motion, to all of which opinions of the court he excepted, and a judgment being rendered against him he has appealed to this court.

The first question which presents itself relates to the admissibility of the deed from the deputy sheriff to the lessor of the plaintiff as evidence. The first objection to the deed is, that it appears upon its face that the sale and conveyance of the land were made by the deputy after his principal had gone out of office. In considering this objection we shall take it for granted that the principal was in office when the land was taken by the deputy, because it is a fact not contradicted by the deed, and was expressly proved in the cause; and we shall, moreover, assume it for true that the principal had resigned before the emanation of the *venditioni exponas* and the sale under it, because the defendant offered to produce evidence of that fact; and by thus assuming it to be true, what we say may be applied to the decision of the circuit court in rejecting that evidence.

It has been repeatedly held by this court, that where a sheriff takes property under a *feri facias*, and goes out of office before he has sold, he may, notwithstanding, proceed to sell, either with or without a *venditioni exponas*, upon the principle that the

authority to make the money by the seizure and sale of property being entire, he who begins may finish it. But it is urged that there is a difference in this respect where the sheriff's term of office expires and where he resigns, as in this case. The difference is, however, not perceived, and it is manifest that the same principle upon which the doctrine is founded in the former case is equally applicable to the latter. In fact, the selling of the estate in such a case is not a privilege which the sheriff may or may not exercise at his pleasure, but it is a duty enjoined upon him by law for the public convenience, and which he may be compelled to perform by a writ of *distringas*; and it would be preposterous to suppose that by resigning his office he could discharge himself from the performance of the duty. The objection cannot, therefore, be sustained.

It is, in the second place, objected to the deed, that the sale was made by the deputy, and not by the principal; for, it is contended that although the principal had a right to sell, the deputy had not. But surely the act must be admitted to be in its nature ministerial, and according to the known rule upon this subject, might be performed by deputy; and if the principal retained the authority, *pro hac vice*, his deputy must do so too, unless his deputation had been revoked by the principal. There is, therefore, no weight in this objection.

Another objection to the deed remains to be noticed, and that is, that a part of the land sold was in Todd county. But it appears from the deed, and that is the only evidence upon which the objection is founded, that Todd county was stricken off after the execution had been levied. The execution was, therefore, rightly begun by the sheriff of Logan, and of course might be rightfully finished by him upon the same principle upon which a sheriff, after he is out of office, may sell property taken under execution while in office. Besides, if the objection was a valid one, the absurd consequence would follow that the land could never be sold; for if the sheriff of Logan could not sell because a part of the land taken was in Todd, the sheriff of the latter could not sell because a part was in Logan; and the whole being taken by an execution which is indivisible, the sale must remain forever suspended. Upon the whole, therefore, we see no valid objection to the deed, and the circuit court was correct in admitting it as evidence.

The next question made in the record relates to the motion for a nonsuit. No specific grounds were taken in the circuit court, nor were any mentioned in the argument in this court

in support of the motion. We apprehend, however, that it was predicated upon the supposed invalidity of the sheriff's deed; and as the objections to it have been already answered, no further observations need here be made on this question.

The third question, and the only remaining one which the record presents worthy of notice, relates to the rejection of the evidence offered by the defendant to prove the resignation of the sheriff before the sale of the land; but from what has been already said, it is obvious that the evidence could have had no effect in the case, and of course was properly rejected by the circuit court.

Judgment affirmed, with costs.

In *Jackson v. Collins*, 3 Cowen, 89, Savage, C. J., says: "But it is contended that the authority of the deputy ceased when the new sheriff had taken the office upon him. In my opinion, the authority of the deputy is limited by the duration of the authority of his principal. An execution against the property of a defendant, partly executed by the old sheriff, shall be completed by him. And in relation to any such execution in the sheriff's hands when he goes out of office, he continues sheriff, and may act by deputy, as if he was still in office. He is in office *quoad hoc*, and the acts of a deputy, in relation to such an execution, are the acts of the sheriff himself." On the power of a sheriff to sell property and to make deeds after he goes out of office, see *Allen v. Trimble*, 7 Am. Dec. 726, and note, 731; *Lemon v. Craddock*, 12 Id. 301; *Puri v. Duvall*, 9 Id. 490.

THOMPSON v. PATTON.

[5 LITTELL, 74.]

PAROL EVIDENCE is not admissible where there is no suggestion of fraud or mistake, to show that an absolute bill of sale was intended as a mortgage.

WRIT of error. The opinion states the case.

Sharp, for plaintiff.

Crittenden, contra.

By Court, MILLS, J. This case presents the question whether the sale or transfer of a slave in contest was absolute, or whether it was intended as a mortgage. The bill of sale, as it is termed, is absolute upon its face, and contains no expression from which a condition can be implied. The complainant alleges that at the time he borrowed of the defendant in chancery two hundred and forty-nine dollars, for forty-nine of which he gave his note on which the defendant has got a judgment enjoined by the bill, and for the remaining two hundred he

pledged the slave in question and gave the bill of sale, under the full understanding and agreement that the slave was to be redeemed in one month thereafter. The answer insists on the bill of sale, denies the mortgage, admits the loan of forty-nine dollars, and relies on the bill of sale as absolute on its face. This brings on a controversy of fact, the circumstances of which we need not recite. Suffice it to say, that to our minds the parol proof, together with the circumstances attendant upon the transaction, preponderates in favor of a loan of the whole money, and that the negro was to be redeemable in a month, or a short period thereafter.

It is also charged in the bill, and not denied by the answer, that the defendant sold the slave shortly afterwards in parts out of this state, and received for her a greater amount than that for which she was either sold or mortgaged, and the bill prays that the defendant may be compelled to account for the residue of her value, or the price at which she sold, after the two hundred dollars are deducted, and that so much of it be set off against the forty-nine dollars. The circuit court dismissed the bill with costs, and to reverse that decree this writ of error is prosecuted.

After this statement of the case, it is evident that the complainant below, now plaintiff in error, is entitled to relief, unless some legal bar is presented to his recovery. It is insisted that the complainant had a plain and adequate remedy at law, and therefore ought not to have brought his bill. Whether such remedy at law does or does not exist, there can be no doubt of the jurisdiction of the chancellor over the matter; for a bill to redeem is properly the subject of chancery jurisdiction, and the act of the defendant in selling and transporting the slave, instead of keeping her for the purpose of redemption, could not oust that jurisdiction, and take the hand of the chancellor from the subject. Besides, the forty-nine dollars are not yet paid, and if that sum and the two hundred constitute the consideration of the contract on one side, the chancellor might interfere to relieve against that amount.

The question must rest upon the inquiry, whether, under the circumstances of this case, the parol proof of what was the real contract between the parties, or parol proof changing the absolute transfer into a mortgage, is admissible. Such proof has been admitted to enable the court of chancery to decide between a mortgage and conditional sale, and instances may not be wanting of such proof being admitted to convert absolute sales into

mortgages; but whether the admission of such proof can be sustained on principle, is an inquiry worthy of our attention. That such proof is admissible, in cases where it is first shown that a deed or writing was drawn different from what was intended, by mistake or fraud, or was executed under circumstances where the free agency of the grantor was controlled, or where it is usurious, as the statute against usury admits such proof, or under any previous circumstance, which may legitimately lay a foundation for, or open the door to, such testimony, cannot be doubted; but whether it is admissible in every case, and may be used to add to, or insert a condition in an absolute deed, by showing that such was the agreement and understanding at the time of the execution, but not inserted in the writing, is a different question. Upon examining the authorities upon this subject, we find them not consistent with each other; for although most of them recognize the general principle, that parol evidence is not admissible to vary the written contract, yet courts have made so many exceptions to the rule, that they have, if all the cases are to be sustained, pared down the rule itself to scarcely the rank of an exception. Thus, slight admissions in an answer, not of the facts charged, but of some other matter, have been widened into a door, at which the whole force of parol evidence may enter, and then the danger of fraud and perjury is increased, and not prevented.

In this case it is not alleged that the bill of sale was drawn differently from what was intended. The complainant well understood the nature of it at the time, and alleges that it was given to gratify the defendant; but with the understanding and agreement, by the by, that the slave was to be redeemable. We therefore conceive that there is no circumstance which can lay a foundation for the admission of parol evidence, or warrant a departure from the principle which we conceive applies to instruments of this kind, as well as to other written instruments. We cannot admit the principle that parol evidence is admissible, of course, to convert a sale made absolute by written evidence, into a mortgage or conditional sale, and thus to alter, enlarge or destroy the effect of the writing. We adhere to the contrary principle, and must apply it here. Many cases may be found to support the admissibility of such proof, and cases decided by this court may have, *sub silentio*, gone on grounds different from those now taken, and others *arguendo*, may have suggested the propriety of admitting such proof; but if such cases exist, we cannot help viewing them as aberrations from correct

principle, and concluding that we had better depart from them than violate a settled doctrine of the law, adopted from motives of great wisdom and sound policy, and matured by time and experience. Applying the doctrine in this case, it is conclusive against the right of the plaintiff in error, and his parol evidence must be disregarded.

Decree affirmed with costs.

ADMISSIBILITY OF PAROL EVIDENCE TO SHOW THAT AN ABSOLUTE DEED OR BILL OF SALE WAS INTENDED AS A MORTGAGE.—The doctrine laid down in this case is the doctrine maintained in the earliest decisions, both in England and America: Jones on Mortgages, sec. 321. And this doctrine still seems to be adhered to with considerable strictness by the courts of a very few of the states: *Arnold v. Mattison*, 3 Rich. Eq. 153; *Brothers v. Harrill*, 2 Jones Eq. 209; *Elliott v. Maxwell*, 7 Ired. Eq. 246; *Chaires v. Brady*, 10 Fla. 133. In Iowa the strictness of the doctrine is somewhat relaxed, and it is declared a fraud on the part of a grantee to insist that a deed is absolute when in its origin it was intended to be a mortgage: *Roberts v. McMahon*, 4 G. Greene, 34; *Johnson v. Smith*, 39 Iowa, 549; *Berberick v. Fritz*, Id. 700. But the current of modern decisions in courts of equity in nearly all the states is in favor of admitting parol evidence to establish the real nature and effect of the instrument by showing the object for which it was made; nor is it necessary to allege fraud or mistake in a suit for relief, although a few of the courts hold that where fraud or mistake is not alleged the parol proof must be very clear and convincing: *Sweet v. Parker*, 22 N. J. Eq. 453; *Phillips v. Hulsizer*, 5 C. E. Green, 306; *Horn v. Keteltas*, 46 N. Y. 605; *Miller v. Stokely*, 5 Ohio St. 194; *Cottrell v. Long*, 20 Ohio, 464; *Ruggles v. Smith*, 1 Head, 141; *Nichols v. Cabe*, 3 Id. 93; *Snively v. Pickle*, 29 Gratt. 27; *Bird v. Wilkinson*, 4 Leigh, 266; *Anthony v. Anthony*, 23 Ark. 479; *Reigard v. McNeil*, 38 Ill. 400; *Roberts v. Richards*, 36 Id. 339; *Sutphen v. Cushman*, 35 Id. 186; *Ruckman v. Alwood*, 71 Id. 155; *Heath v. Williams*, 30 Ind. 495; *Crane v. Buchanan*, 29 Id. 570; *Pond v. Eddy*, 113 Mass. 149; *McDonough v. O'Neil*, Id. 92; *McDonough v. Squire*, 111 Id. 47; *Campbell v. Dearborn*, 109 Id. 130; *Price v. Gover*, 40 Md. 102; *Littlewort v. Davis*, 50 Miss. 403; *Anding v. Davis*, 38 Id. 594; *Klein v. McNamara*, 54 Id. 90; *Shade v. Bessinger*, 3 Neb. 140; *Edrington v. Harper*, 3 J. J. Marshall, 354. In some of the states it is expressly decided that parol evidence for the purpose of showing an absolute deed, to be intended as a mortgage is admissible in equity, but not in law: *McLane v. White*, 5 Minn. 178; *Hogell v. Lindell*, 10 Mo. 483; *O'Neill v. Capelle*, 62 Id. 202; *Moore v. Wade*, 8 Kans. 380; *Wells v. Morrow*, 33 Ala. 125; *Bragg v. Massie*, 38 Id. 89. In several of the states the admissibility of parol evidence is carried much further, and it is held to be admissible, in courts of law as well as in courts of equity, to show that a deed or bill of sale absolute in form was intended to be a mortgage. In discussing this question in *Fuller v. Parrish*, 3 Mich. 211, the court say: "Admitting that this constitutes an exception to a general rule, based upon the soundest principles of jurisprudence, what great danger is to be apprehended from it? It has long been familiar to courts of equity, at least, and is of as safe and easy application in courts of law, organized as our courts now are." To the same effect are: *Kent v. Agard*, 24 Wis. 378; *Kellum v. Smith*, 33 Pa. St. 158; *Fessler's Appeal*, 75 Id. 483; *Plumer v. Guthrie*, 76 Id. 441; *Despard v. Wal*

bridge, 15 N. Y. 374; *Johnson v. Sherman*, 15 Cal. 287; *Jackson v. Lodge*, 36 Id. 28; *Hurford v. Harned*, 6 Or. 362. The supreme court of the United States decide, in *Peugh v. Davis*, 96 U. S. 332, that any evidence, written or oral, is admissible to show that a deed absolute in form was really a mortgage, when it was executed as a security for a loan of money. See also *Russell v. Southard*, 12 How. 139; *Morris v. Nixson*, 1 Id. 118; *Sprigg v. Bank of Mt. Pleasant*, 14 Pet. 201. For additional authorities on the subject here discussed, see note to *Ross v. Norvell*, 1 Am. Dec. 425; *Washburn v. Merrill*, 2 Id. 59.

McCAMPBELL v. McCAMPBELL.

[5 LITTELL, 92.]

ESTOPPEL IN EQUITY.—A question tried in a court of law, having jurisdiction, will not be re-tried in equity in a suit between the same parties.

IMPROVEMENTS, COMPENSATION FOR.—If land be sold by a verbal sale, and possession given to the purchaser, he will be allowed in equity for improvements made by him, if the vendor refuses to convey the property.

CHARGING DEBTS ON LAND.—A provision in a will giving the testator's wife "the free and uninterrupted possession of the mansion-house, plantation and stock, and profits thereto belonging. Next, all lawful, just debts discharged," does not charge the land with the payment of the debts.

INTENTION OF TESTATOR cannot be shown otherwise than by his will; proofs cannot be received to alter the effect of the will.

DEBTS OF TESTATOR may be directed to be paid by his legatees, ratably according to the amount received by each.

EXECUTOR'S RIGHT TO REFUNDING OF MONIES PAID BY MISTAKE.—If the executor and all the persons interested erroneously believe that a tract of land is chargeable with the payment of a debt, which he, therefore, pays, equity will compel the legatees to refund.

STATUTE OF FRAUDS.—A contract which comes within the statute of frauds is not entirely void. It is valid for all purposes, except sustaining an action at law for its breach, or a suit in equity for its performance.

PURCHASER'S LIEN.—If a purchaser pay a portion of the purchase-price of lands, and the contract of sale be not enforceable because within the statute of frauds, he has a lien on the property to secure the repayment of the amount paid. He has not the right to retain the possession until paid out of the rents, but is entitled to a decree for the sale of a quantity sufficient to cover his lien.

PERSONAL ESTATE is the proper fund for the discharge of all debts and legacies, which the will does not make chargeable on real estate.

LEGATEES should not be required to pay any part of the debts until the executor has accounted for the personal estate.

EXECUTOR, WHAT CHARGEABLE WITH.—In this case the executor was not charged with the amount of the inventory, but only for the property which came into his hands, and was applied to his own use.

LEGACY PAID BY MISTAKE.—One who, under the mistaken belief that he was entitled to a tract of land, pays a legacy charged upon it, may recover the sum paid, from the true owner.

IN MARSHALING ASSETS for the payment of debts of a decedent, the following order should be observed: 1. The general personal estate; 2. Estate specifically devised to be sold; 3. Estate descended; and, 4. Estate specifically devised, though charged generally with the payment of debts. The second and third rules change places where the estate set apart for the payment of debts is charged generally, and not specially.

LEGATEES who have received general or specific legacies from the personalty, must refund the whole thereof, if necessary for the payment of debts, before resort can be had to real property.

LEGACIES CHARGED UPON THE ISSUE OF LANDS DEVISED, stand on the same footing as land when called to contribute to the payment of debts; and, in such cases, the legatees and the devisees of the land must contribute ratably, according to value.

SETTLEMENTS OF THE COUNTY COURT WITH EXECUTORS are evidence between the parties of the amount of the debts.

INTEREST may be allowed an executor on sums advanced by him.

REMAINDER, COMPUTING VALUE OF.—The value of a remainder is ascertained by making a probable estimate of the life of the holder, health and age considered, and then raising an annuity equal to the interest of the value of the estate, and calculating its present worth at a fixed ratio, supposing it to continue during the probable length of life, and deducting that present worth from the value of the estate, and the residuum is the worth of the remainder.

BILL in equity. In a previous action of ejectment between the same parties, it appeared that Samuel McCampbell by his will provided as follows: "To my son, Andrew McCampbell, I give and bequeath the plantation, my present place of residence, containing two hundred acres, after the death of his mother." By a codicil it was further provided: "I do leave it as my last will and desire, that my son George Washington McCampbell, after my decease, is to have the care and management of the plantation on which I now reside, for the care and maintenance of his mother, and those of the children, whose home and residence it may be as long as he may see cause to act in that business, or until my son Andrew McCampbell may arrive at the age of twenty-one. And provided my son Andrew may choose to go to education, instead of the plantation, that may be done, and the plantation here alluded to, then to be George Washington McCampbell's, by his paying the expenses of his education, and that to be done before he may come of age." Andrew was fifteen years old at his father's death, and in the presence of his mother, sisters and elder brothers elected to take an education. He went to school for nine months at the expense of his brother; but then abandoned that idea, and desired to learn the tanner's trade. He took four hundred dollars in lieu of his education, but soon gave up the project, and returned to the plantation,

where he lived until he attained his majority. When Andrew was twenty-two years of age he agreed with George to take one half the farm in lieu of the four hundred dollars; whereupon, the testator's executors conveyed one half thereof to him. To recover this half, Andrew brought ejectment against George, who was in possession, and recovered judgment. On appeal the judgment was affirmed. George then filed this bill. The relief sought particularly appears from the opinion.

By Court, **MILLS, J.** Much of the history of this case may be learned from the decision on a judgment at law between the same parties, at the fall term of this court, 1819, to which reference is made: See 2 Marsh. 112. After that decision, George W. McCampbell, against whom that judgment was rendered, filed this bill in equity, still asserting and claiming the election of his brother, Andrew, to take an education in lieu of the land, and the subsequent agreement to accept four hundred dollars, and learn the farmer's trade, and finally the compromise between himself and said Andrew, after his arrival at age, to accept one half of the land free from incumbrances, in lieu of the four hundred dollars, or in lieu of the whole of the land incumbered by the debts of their testator. He alleges that it was expressed by the testator, at the time he dictated his will, as his intention to charge the debts on the home plantation, which is now the subject of controversy, and that the writer had omitted to insert the clause; but he contended that such was the construction of the will as it now stands, and that all the family had so understood it; and that in consequence of this expectation and belief, he had discharged out of his own funds the debts of the testator to a large amount, or had furnished the executors with money to do it, and had also paid off the legacies given by the will to the daughters; and that in all this, the defendant in chancery, Andrew McCampbell, had acquiesced, and in pursuance thereof had received half the land laid off, and conveyed to him, as detailed in the trial at law. He further charges that the said Andrew, by the consent and permission of his mother, had, in her life-time, enjoyed and used for many years twelve acres of the home farm, for the rents of which he ought to account. He therefore prays that the said Andrew McCampbell may be compelled to convey the land to him, or if this cannot be granted him, that the said Andrew shall be compelled to pay the debts and legacies charged on the farm, if they were so charged; and if not, that he, the said Andrew, and the rest of the children, may be compelled to pay their ratable propor-

tion of these debts and legacies; that Andrew may be compelled to pay for valuable improvements, and account for the rents of the twelve acres which he had enjoyed in the life-time of his mother.

The rest of the children answered, admitting the allegations of the bill, and that they were accountable for their proportions of the debts and legacies, unless they were charged by the will on the mansion tract. Andrew answered, and relies on his judgment at law as conclusive against the legal title being in the complainant, and as putting asleep the question of the farm having been vested in the complainant by virtue of his supposed election to accept an education. As to the last agreement, after he was of age, in which he received from the complainant a conveyance for half the land, it having been first conveyed to the complainant by the executors, he pleads and relies on the statute to prevent frauds and perjuries. He denies the existence of debts against the estate, or payment of them, and contends that his testator died possessed of considerable personal estate, and that it ought to be accounted for before the land is reached in the hands of the devisees.

The court below dissolved the injunction as to the land, and refused a conveyance thereof, and after directing an account to be taken, decreed that each child should refund ratably, to the complainant, the debts and legacies which he had paid; that Andrew should pay for legacies, charged upon the farm, and for improvements made since the deed made to the complainants by the executors, after deducting rents, and, also, that rents should be charged against Andrew on the twelve acres, which he enjoyed in the life-time of his mother. From this decree, Andrew McCampbell has appealed.

The decree of the court below, so far as it decides against the appellee's right to the land, cannot be questioned by the appellant, as it is so far in his favor; nor can it come before the court on this appeal, unless on a reversal of the decree; this court shall be led back to correct all the apparent errors. We shall, however, observe that the question as to the legal estate was tried in the action at law, and whether there was such an election of an education on the part of Andrew, as divested him of his title under the provisions of the will, is a question set at rest by that trial, so far as respects this suit. Whether the ratification of Andrew, after he came of age, of former agreements, and his acceptance of half the land, did, or did not, vest an equitable estate in his brother George, is a question properly

triable in equity, and could not be tried in the action at law. In response to this, the appellant has relied on the act of assembly to prevent frauds and perjuries. When this arrangement was made, it was supposed between the parties that the executors alone could convey the title. A surveyor was procured by the appellant, and he divided the land. The executors, who were two of the heirs made defendants to this bill, conveyed to George the whole land, and George conveyed the half thereof to Andrew, and he then executed a receipt to George in full of all demands against the estate. The executors had no authority to convey, and, of course, their conveyance to George passed no title, and although there was an agreement on the part of Andrew to accept the deed to the half, in full of his interest in the estate, yet as he gave no writing conveying his interest in the land or binding himself to do so, his plea of the act must prevail, and the chancellor did right in refusing to decree a conveyance.

But as Andrew, by this agreement, admitted his brother's title to the half of the land now in contest, and the parties then supposed that the title to the half now recovered from George, was vested in him, and under the faith of this agreement and understanding, he proceeded to improve the land, according to repeated decisions of this court. The court below did right in compelling Andrew, who now dissents from this arrangement, to pay for all lasting and valuable improvements or ameliorations of the half of the land now in contest, lessened by the reasonable rents of the premises in dispute.

Nor is there any ground for supposing that the debts of the testator are charged on the mansion-farm by the will. The only provision with regard to debts, is to this effect:

"I give and bequeath unto my dearly beloved wife, Martha McCampbell, the full, free and uninterrupted possession of mansion-house, plantation and stock, and profits thereto belonging, during her natural life, for her own use and benefit, and support of the children under her charge. Next, all lawful, just debts discharged." He then devises to James McCampbell, one of his sons, two hundred and fifty acres of land, another tract, to his son John a third tract, under the condition that he paid his son George, now appellee, one hundred pounds, after George came of age; to William, another son, he devised a fourth tract, on condition of his paying to another son, Samuel McCampbell, one hundred pounds. Then he inserts these clauses: "To my son, Andrew McCampbell, I give and bequeath

the plantation, my present place of residence, containing two hundred acres, after the death of his mother. To my daughter, Margaret, I give and bequeath the young sorrel mare and saddle, and whenever she shall marry and remove her residence, she is to have one feather bed with its furniture, two cows, and as soon as her brother can furnish her from the home place, she is also to have a desk or bureau, whichever she may choose. To Martha McCampbell, my daughter, I give and bequeath a good mare and saddle, and whenever she shall marry and remove, she is to have one feather bed with its furniture, two cows, and as soon as her brothers can furnish her from the home place, is to have a desk or bureau whichever she may choose. And to Jane Logan I give and bequeath fifty pounds to be paid; twenty-five pounds from the home plantation, and twenty-five pounds by John McCampbell, which payments are to be made as soon as is convenient. To my daughter Nancy Elliott, I give and bequeath a cow formerly lent them, and a yearling heifer. And to Molly Lawson I give and bequeath five pounds."

Some months after, he added this codicil: "As a codicil or small alteration to the former will, I, Samuel McCampbell, as aforesaid, do leave it as my last will and desire that my son George Washington McCampbell, after my decease, is to have the care and management of the plantation on which I now reside, for the care and maintenance of his mother, and those of the children whose home and residence it may be, as long as he may see cause to act in that business, or until my son, Andrew McCampbell, shall arrive at the age of twenty-one; and provided my son Andrew may choose to go to education, instead of the plantation, that may be done; and the plantation here alluded to, then to be George W. McCampbell's, by his paying the expenses of his education, and that to be done before he may come of age."

Notwithstanding the clause in this will relative to debts is expressed defectively, as if something was intended, not expressed; yet as it is capable of construction as it stands, and the debts thereby are left to be discharged out of the general fund not specifically bequeathed, we cannot add thereto or alter it, but must disregard the proof introduced, conducing to show that it was intended to charge the debts solely on the mansion-farm, so far as it is contended that such proof can alter the will.

Nor do we conceive the court below erred in directing the debts to be paid ratably, according to the portions which each had received, with the exceptions and modifications hereafter

stated. As the debts were chargeable on the general fund, and were paid by George, on the mistaken supposition that they were charged on the mansion-farm, and that the farm belonged to him, he ought to recover them. This appears to have been the general mistake of the family, and conformable to this Andrew divided the land, and accepted a conveyance for one half from George. As the matter was settled in this way, by the mutual mistake of all concerned, and Andrew had distributed this settlement by correcting the mistake, it is equitable that he and the rest should restore the benefits derived from that mistake, before he is restored by what he has lost by it, for we conceive the proof clear that this was the mutual mistake of all parties concerned. In consequence of this George furnished the executors with money to pay the debts, and Andrew accepted half the land as his portion, free from debts, after his arrival at age, and executed a full receipt.

The objection made to this on the part of Andrew is, that George cannot recover against his co-distributees in this suit, but must resort to his action at law against the executors, for money loaned or advanced for the purpose of paying debts. It is true, that for such advancement, made in the ordinary way, he might be compelled to resort to his action at law; but this was advanced under peculiar circumstances. The rest admit their responsibility, if the debts were not charged on the farm, and Andrew participated and concurred in the general mistake, though he now seeks to avoid the consequences of its correction. If the executors had advanced this money, there is no doubt they might sustain their bill to compel contribution; and as George, one of the distributees or legatees, has done it, on the supposition of all concerned that it must come out of that part of the estate at last, which he held, when it did not belong to him, we conceive a bill in equity may be indulged in his favor, to set the whole matter right, and avoid circuity of action. One distributee may maintain such a bill to compel contribution against others, when they have received more than their proportions, and this is in fact the result of what has happened from the mistake of the parties in this case.

The court below, after having settled the account and ascertained what was due by Andrew for improvements, and his proportion of debts and legacies, decreed in favor of George, a lien upon the land, and that he should keep it, at a reasonable rent, until this demand was paid, and this part of the decree is objected to by Andrew. George claims this land, first,

under the will of his father, and the election of Andrew to accept an education. Whether he could or could not have such lien, or recover improvements, under that claim only, we need not now determine; for the chancellor has not based the decree on this claim, but has commenced the account from the date of the deeds from the executors to George, and from George to Andrew, under George's second claim, by virtue of this parol agreement; and the question is, whether, under this, he is entitled to such lien. Here we may observe that a contract which comes within the act to prevent frauds and perjuries, is not void entirely. It is valid to some purposes, or indeed to every purpose, except that an action at law cannot be sustained for its breach, or a bill in chancery to compel its execution.

It is, nevertheless, good as a matter of defense. If it is fulfilled by the parties, it is as good as any other contract. If it is dissolved, precisely the same consequences follow. Hence this court has allowed the same measure for rents and ameliorations, in such cases, as on the dissolution of others. Whether there be or be not a lien, does not depend so much upon what kind of contract there is as upon the question whether there was or was not a contract; or, in other words, whether there was or was not a consent of the parties to the attitude in which they stand; for the doctrine of liens is based upon consent, and cannot exist without it. Now although the parol testimony that there was such contract is inadmissible to prove that George is entitled to specific execution, yet it is good to show that he advanced his money under an understanding that he was the purchaser of the land; and it is well settled that the purchaser has a lien for his money advanced in payment for an estate which he cannot keep, as well as for his ameliorations made thereon, when he supposed it to be his own. We therefore conceive that although this contract cannot be specifically executed, because of the statute, yet, it is valid to give a lien, and that the money advanced by George was the same as if advanced by a purchase under any other contract, which became, or was, invalid; for he was in fact the purchaser of the land, under the supposed terms fixed by his ancestor. But we do not see the propriety of the mode taken by the chancellor to effectuate this lien; that is, to permit George to keep it at a reasonable rent; until the debt is discharged. This might do injustice to both. The general effect of liens is that the subject, if not redeemed in a reasonable time, ought to be sold,

and the proceeds thereof appropriated to discharge what is due thereon, and the balance to the use of the original holder. Such ought to have been the consequence in the present instance.

There are divers exceptions taken by Andrew to the details of the decree, some of which appear to be well founded. He is charged with one hundred and eighty dollars for the rent of twelve acres of the mansion-farm, in the life-time of his mother, which, according to the appellee's own statements, were occupied with the consent and permission of the mother; nor does it appear to have been objected to by the appellee, who was the manager of the farm, nor was there any agreement to pay rent. The farm at the time belonged to the mother, and if she permitted the use of any part of it to be made by any one without rent, she indubitably had a right to do so, if she did not thereby deprive the farm of the means of paying the charges upon it, which does not appear to have been the case. This item in the decree we deem erroneous, and it ought to be dismissed from the controversy, leaving the representative of the mother, or whoever permitted him to enjoy the land, to recover the rents thereof, under any contract which Andrew may have made for the payment thereof.

It also appears in the controversy that there was an inventory or an appraisement of the personal estate made and returned; and although it was first liable to the payment of the debts, it was never sold for the purpose of raising the necessary funds. A small portion of it, indeed, was appropriated in discharge of debts; the residue was used, and perhaps worn out, and deteriorated by the mother and the children who resided with her, and some remained at her death, which George kept. It is insisted that the decree of the court is erroneous in not compelling an account of this before the legatees were charged with their respective portions of the debts. This objection to the decree is well founded; for although wills have no operation upon creditors themselves, so as to prevent their reaching the estate of the testator, yet when the question comes to be settled up between the legatees or devisees, or between them and the executors, the question as to what fund is to be applied to the payment thereof, is one of an important character. And as between real and personal estate, whether the latter be or be not specifically bequeathed, the personal is the proper fund for the payment of debts and legacies, and in general it ought first to be thus applied, though the real estate may be charged:

2 Johns. Ch. 614. In this case, therefore, as the lands are not expressly charged, the personalty ought to have been devoted to the purpose, and as much of it now as can be ought to be made use of for that purpose. We would now be understood not to speak of those legacies which were expressly charged upon the lands as included in the term personal estate; of them we shall speak hereafter. According to this rule, the personal estate ought and must be accounted for. Here the inquiry arises, whether the complainant ought to account for the personal estate, so far as it has been appropriated to debts, and the residue left at his mother's death, or ought he to be charged with the appraised value of the whole, and as it ought to have been appropriated to the discharge of debts? By the arrangement made with the executors, he paid the money for them, and he ought not to stand in a better attitude than they would; and that it was their duty in this case to have made the most of the personal estate in the payment of the debts, according to the construction now given to the will, there is no doubt; and if they were in controversy now with creditors, or with any of the distributees who had not participated in the arrangement that was adopted, there could be no hesitation in charging them with the full value of the personalty, or of making the same charge against George W. McCampbell, who stands, as to this, in their stead.

There are, however, circumstances in this cause which ought to excuse them from this charge. The executors were two of the heirs and distributees. The greatest portion of the personal estate was directed by the will to pass to the mother during life for the maintenance of the family, and all of them appear to have believed that the debts were charged on the mansion-farm. According to this belief, it appears to have been an arrangement assented to by all, that the mother and family should keep and use the personalty, and George, the supposed owner of the mansion-tract, on which they all believed the debts to be charged, should pay the debts himself. In this arrangement every one of them appears to have been concerned, both executors and other legatees. They all, except Andrew, now contend that the mansion-tract is still liable, and if not, admit their liability to contribute, and Andrew himself as strongly concurred in and sanctioned this arrangement as any of them, by his different bargains, and especially by the last, in which he took a conveyance for his part of the land, and executed his receipt in full. By this arrangement a great

portion of the personal estate which might have paid debts is lost, and as they were all participators in it, it does not seem equitable to charge one, or two, or three of them, with the loss in which they are equally guilty. Of course, we conceive that George must only be charged with such part of the estate as came to his hands, and was applied to his own use, and that the debts ought also to be lessened only by that part of the estate which was paid in discharge of the debts. Thus, the loss to which they all contributed will be borne by them ratably, and such ought to have been the account taken.

The complainant has also paid sundry legacies, which he supposed he was bound to pay, as well as the debts, in consideration of keeping the home farm. For these he also seeks remuneration. It is contended by the appellant, Andrew, that one half of the legacy of Jane Logan was to be paid out of the estate on the home farm, and was not a charge on the land itself. We do not concur in this construction of the will. The devise is in these words: "To Jane Logan I give and bequeath fifty pounds; to be paid twenty-five pounds from the home plantation, and twenty-five pounds by John McCampbell." Now, as John McCampbell had a tract of land previously devised to him, and on another tract devised, the testator had charged legacies, it is evident that he intended half of this legacy as a charge on John's land, and as the home farm went to another son, the intention is equally clear that the remaining half of this legacy was to be a charge on his lands; and as George, the complainant, paid this legacy, supposing the land his, when it was Andrew's, it is right that Andrew should remunerate him, and the court below acted correctly in charging Andrew with it. The court below has also charged Andrew with the two bureaus, one gotten by Martha and the other by Margaret, under the will, and also with the mare gotten by Martha, under the bequest thereof, as legacies charged by the will on the home farm or mansion-tract of land; and the propriety of this is questioned, and it is contended, that these are not charges on the land. As to the two bureaus, we conceive they are rightly charged. The language of the will directs them to come from the mansion-tract; and although it might be supposed that the intention was that they should be paid out of the profits of the lands, yet when it is considered that the same language is used in these cases that is employed in the bequest to Jane Logan, and that her's is coupled with a circumstance before noticed, which shows that it was a charge upon the land,

we adopt the same rule with regard to these also. As to the **mare** paid to Martha, we see no propriety in charging her upon the land. Not a word is said to that effect, and it is evident that a general legacy from the personalty was intended. There is, therefore, no pretext for charging Andrew with this legacy. As it was to come out of the personalty, and if the whole had been applied to the payment of debts, as it ought to have been, the legatee could not have received it, and as it was paid to her wrongfully, or to her husband, he must be compelled to restore it to George, the complainant. This will lessen the amount out of which Martha, or her husband, will be compelled to contribute, ratably, to the payment of debts. To the rest of the account against Andrew, we perceive no well-founded objection.

The question how the debts paid by the complainant are to be levied upon the respective parties, forms another inquiry. In this we cannot sustain the decree of the court below. In marshaling assets for the payment of debts, they take the following order: 1. The general personal estate; 2. Estate specifically and expressly devised to be sold; 3. Estate descended; 4. Estate specifically devised, though charged generally with the payment of debts. To this arrangement there is an exception, and the second and third rules exchange places, where the estate set apart for the payment of debts is charged generally and not specially. See *Livingston v. Newkirk*, 3 Johns. Ch. 313, and cases there cited. Taking this arrangement for a guide, and the rule before noticed, preferring the personal estate as a fund for debts, before real, it will necessarily follow that all those who have received general or specific legacies from the personalty, must account for the whole received, if the debts so require, before the real estate can be touched. Of course the legatees, Margaret, Martha, Nancy and Molly, or their husbands, must account for their whole legacies, in discharge of the debts paid by George, as the debts are large enough to require it, and after that they cannot be subject to further contribution. We have, among the legacies named, made no distinction between those that are specific and those that are general, although that given to Margaret is evidently specific in part, not because there is no difference in law between them, for general legacies are subject to debts before those which are specific, but because the debts here are large enough to consume the whole, and the distinction therefore need not be attended to.

The legacies bequeathed to the complainant, to Samuel, Jane

Logan, and a bureau each to Martha and Margaret, although in money or personal estate, we place on a different footing. They are charged upon and issue from the lands devised, and therefore stand on the same footing with the land, when called upon to contribute to the payment of debts. They must contribute ratably and proportionably to the amount of each, with the landholders, according to value. After the special account, for which Andrew alone is chargeable, in favor of George, is ascertained, the amount of debts must be taken from the executorial settlement with the county court, which we deem good evidence between the parties. This amount must first be lessened by the personal estate actually appropriated towards the payment of any part of it, as well as that which remains and was gotten by the complainant. The legacies of personal estate must be applied next, as before directed, to discharge the amount, and the residue must be apportioned between the devisees of land and legatees of legacies arising from land, as before directed. The part or proportion of the complainant must be ascertained and deducted, and the remainder be decreed in due proportions. According to these principles, the account must be taken in the court below, which is, in several respects, different from that already taken. We will also add, that it is objected that the court below erred in allowing the complainant interest on the sums paid by him for debts and legacies. To this we can see no forcible objection. The complainant paid these sums under the supposition of all concerned, that they were the considerations for the land, and as he has lost the land he is compelled to account for its reasonable rents, profits, and injury done thereto. Under such circumstances, it cannot be inequitable to allow him legal interest, as has been done, on its restoration.

There is another apparent error in assessing the debts on the devise to Andrew, in the court below. He is charged with the legacies paid by George, which were charged on the home place, and yet his land is not lessened in value by those legacies. Other lands devised to some of the rest, were charged with legacies, and these legacies were deducted from the value of their respective devises; but this was omitted with regard to the land of Andrew. If Andrew is now to be charged with these legacies, in favor of George, who first paid them, it is evident that the devise to him was lessened to that amount. One half, therefore, of the legacies left to Jane Logan, and the two bureaus to Margaret and Martha, must be deducted from

the price of Andrew's land, before the sum can be ascertained on which his proportion of debts is charged.

There is still a heavier charge on the estate devised to Andrew, which remains to be noticed, and which must greatly lessen its value. The life estate of the mother lessened the value of this land and Andrew only took the remainder in fee, and for the value of this remainder only can be charged. Here the difficult question is presented, how is the value of this remainder to be ascertained? The estate is divided and after the life estate of his mother, he then, and not before, is to possess it. When a life estate is still existing there is no other way of ascertaining the value of its remainder, but by making a probable estimate of the length of the life of the holder, health and age considered, and then raising an annuity equal to the interest of the value of the estate, and calculating its present worth at a fixed ratio, supposing it to continue during this probable length of life, and deducting that present worth from the value of the estate, and the residuum is the worth of the remainder: See *Swain v. Perine*, 5 Johns. Ch. 482 [9 Am. Dec. 318]; and *Everton v. Tappan*, Id. 497.

Here the existence of the life of the mother after the death of the testator can be accurately ascertained. The interest for one year on the value of the land devised to Andrew, must form an annuity, the present worth of which is to be ascertained for the given number of years at the ratio of six per centum per annum. But it appears that, pending this life estate, and before the death of the mother, Andrew, by the arrangement with George, got possession of one half of the estate, in quantity, after it was laid off to him, which creates two periods, on each of which the worth of an annuity must be calculated, to wit: one from the death of the testator until Andrew took possession of a part of the estate, and the other from this last period until the death of the mother. Of course, to ascertain the value of his remainder, in proportion to which he must pay debts, let the value of his land be taken, first lessened by the aforesaid legacies which he has to pay, and let its interest for one year be the annuity raised; and next let the present worth of this annuity be ascertained at the ratio of six per centum per annum, for the time which elapsed between the death of the testator and the commencement of Andrew's possession of the share of the estate which was conveyed to him by George; next, let the part of the estate of which he did not thus get possession be ascertained, and by the interest of this last value for one year, let a second annuity be raised

and its present worth also be calculated at the ratio of six per centum per annum from the time Andrew took possession of that part of the estate which he holds under the arrangement with George, until the death of the mother; next, let the two results, that is, the present worth of each of these annuities, be added together and the amount be deducted from the full value of the devise to Andrew, first lessened by the legacies which he has to pay, and the balance left will be the worth of the remainder which he took under the will, according to which he is to be charged with his proportion of the debts paid by George, and which he is entitled to recover ratably from the family.

The decree of the court below must be reversed, with costs, and the cause be remanded, with directions to the circuit court to cause such further proceedings to be had and such decree to be rendered as may be conformable to this opinion.

CONTRACTS WITHIN THE STATUTE OF FRAUDS, HOW REGARDED BY THE COURTS.—Bronson, C. J., in *Abbott v. Draper*, 4 Denio, 51, says: "Although the statute declares a parol contract for the sale of lands void, it does not make it illegal. It is not a corrupt or wicked agreement; nor does it violate any principle of public policy. Parties are at liberty to act under such contracts if they think proper." The courts have, therefore, regarded such contracts as morally, though not legally, binding upon the parties to them, and by the construction uniformly given by them to the statute, its operation has been limited to such executory contracts as have been, in no substantial part, executed: *Greer v. Greer*, 18 Me. 12; *Davenport v. Mason*, 15 Mass. 85.

HOW FAR MAY BE RELIED UPON AS GROUNDS OF DEFENSE OR RELIEF.—

1. Where the contract or agreement has been fully executed on both sides, the rights of the parties become fixed, and neither of them, nor any stranger, can interfere with, or unsettle, such rights. If a verbal contract has been executed, it cannot be avoided merely because the statute of frauds requires such contracts to be in writing: *Andrews v. Jones*, 10 Ala. 400. Where a surety had paid money and brought suit to recover it back, on the ground that his promise to be answerable for the default of his principal was within the statute, not having been in writing, the court refused to grant him relief, and said: "To give such an operation to the statute, would pervert its aim, and convert it into a sword instead of a shield;" *Craig v. Vanpelt*, 3 J. J. Marsh. 489. So where a husband who, previously to his marriage, agreed verbally with his intended wife to devise to her and to their children all the property which came to him through her, made a will in fulfillment of such agreement, but afterwards added a codicil in which he changed the devise to her into a life-estate, it was held that, by the will, the oral agreement became executed, and he had no power to alter it by the codicil: *Lowe v. Bryant*, 30 Ga. 528. "Where a contract which, when made, was within the statute of frauds, and might have been avoided thereby, has been fully executed, the statute furnishes no defense:" *McCue v. Smith*, 9 Minn. 258; *Pawle v. Gunn*, 4 Bing. N. C. 445; *Price v. Leyburn*, Gow, 109; *Randall v. Turner*, 17 Ohio St. 262; *Brown v. Bellows*, 4 Pick. 179. "A vendor may, by pleading the statute of frauds, avoid a parol contract for the sale of land, or waive it and

consummate his contract, and cannot be deprived of his right to do so by a stranger. * * * * The statute was made for the benefit and protection of the parties to the contract, and those claiming under them, and not for the benefit of strangers to the same." *Clary v. Marshall*, 5 B. Mon. 266; *Jacobs v. Smith*, 5 J. J. Marsh. 380; *Dawson v. Ellis*, 1 Jac. & Walk. 524.

2. Where a contract within the statute has been completely executed on one side, the consideration may be recovered back. In *Gray v. Hill*, Ry. & M. 420, Best, J. C., says: "The agreement is executed on the part of the plaintiff, and the defendant is legally liable to remunerate him for what he has done." *Fitzsimmons v. Allen*, 39 Ill. 440. "But when a verbal contract is performed by the conveyance of land on the one part, there can be no difficulty in compelling the equivalent from the other contracting party. A court of equity can decree specific performance, if that is needed, and a court of law can allow a recovery of the purchase-money, if that is all that is sought." *Holland v. Hoyt*, 14 Mich. 238; *Thomas v. Dickinson*, 2 Kern. 364; *Butler v. Lee*, 11 Ala. 885; *Wilkinson v. Scott*, 17 Mass. 249; *Linscott v. McIntire*, 15 Ma. 201; *Gibson v. Wilcoxon*, 16 Ind. 333; *Pomeroy v. Winship*, 12 Mass. 513; *Bowen v. Bell*, 20 Johnson, 338; *Wood v. Gee*, 3 McCord, 421.

3. Where there has been a performance by either party of a substantial part of the contract, so that it would be unjust or inequitable to the party who has performed to allow the other party to treat the contract as a nullity; courts of law will permit the party who has performed to recover back the property delivered in part execution of the contract, and courts of equity will, in such cases, either compel a specific performance of the contract, or grant such other relief as the circumstances of the case demand: *Lucy v. Bundy*, 9 N. H. 298; *Lockwood v. Barnes*, 3 Hill, 128; *Foot v. Emerson*, 10 Vt. 344; *Gillet v. Maynard*, 5 Johns. 85; *McCray v. McCray*, 30 Barb. 633; *Brewer v. Brewer*, 19 Ala. 481. "As to what shall be said to be a part execution of a contract, sufficient to take it out of the statute, there has been some doubt. The general principle is that the act or acts constituting such part performance, must be such as would not have been done, but on account of the agreement; that they be done with a view to perform it, and that they be prejudicial to the performing party." *Davenport v. Mason*, 15 Mass. 85. Hence, acts of part performance which were not done in pursuance of the contract, will not take it out of the statute: *Billinglea v. Ward*, 33 Md. 48; *Rosenthal v. Freeburtyer*, 26 Md. 75. "The ground upon which chancery interposes its aid in the case of a clear part performance of a verbal agreement, is that to withhold it would be to suffer a party seeking to shelter himself under the statute of frauds, himself to commit a fraud." *Hamilton v. Jones*, 3 Gill & J. 127; *Woods v. Dille*, 11 Ohio, 455; *Rgan v. Dox*, 34 N. Y. 307; *Letcher v. Cosby*, 2 A. K. Marsh, 106; *Rose v. Bates*, 12 Mo. 30; *Jackson v. Bull*, 2 Caines's Cases in Error, 301. In order to entitle a party to a decree of specific performance, the parol contract must be clearly proved: *Ch. of Advent v. Farrow*, 7 Rich. Eq. 378; *Whitridge v. Parkhurst*, 20 Md. 62; *Loddell v. Loddell*, 36 N. Y. 327. But where such agreement is distinctly set forth in the bill and confessed in the answer, specific performance will be decreed: *Newton v. Swazey*, 8 N. H. 9; *Artz v. Grove*, 21 Md. 456; *Ogden v. Ogden*, 4 Ohio St. 182. So where a party has been put in possession, under such parol agreement, and made improvements or paid part of the price: *Merrilow v. Andrews*, 44 Barb. 200; *Brown v. Jones*, 46 Id. 400; *Parkhurst v. Van Cortland*, 14 Johns. 15. So also at law assumpsit will lie to recover back money paid under a parol contract within the statute, or for expenses incurred or services rendered in part performance of such contract: *Allen v. Booker*, 9

Stow, (Ala.) 21; *Kidder v. Hunt*, 1 Pick. 328; *Barickman v. Kuykendall*, 6 Blackf. 21; *Hambell v. Hamilton*, 3 Dana, 501. And in *State v. Dorr*, 5 Wend. 204, recovery was had upon a *quantum meruit*, where services were rendered under such an agreement.

RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER AVOIDED CONTRACTS.—“The contract itself may, for the purposes of defense, be used as a shield to protect the defendant against unconscientious demands and claims growing out of the contract:” *Gray v. Gray*, 2 J. J. Marsh. 21; *Bagford v. Pearson*, 9 Allen, 387; *Roberts v. Tennel*, 3 Mon. 247; *Philbrook v. Bellnap*, 6 Vt. 383; *Burlingame v. Burlingame*, 7 Cow. 92; *King v. Brown*, 2 Hill, 485; *Smith v. Smith*, 4 Dutch. 208. And a party in under a parol lease within the statute may show by it that he is not a trespasser: *Roberts v. Tennel*, 3 Monroe, 247; or may maintain trespass against the owner: *Wilber v. Paine*, 1 Ohio, 251.

MATTOX v. HELM.

[5 LITTELL, 186.]

EJECTMENT BY A LANDLORD AGAINST HIS TENANT, who holds over after the term has expired, the former may rely on the lease, and need show no other title.

WRIT OF POSSESSION MAY BE ENJOINED by turning out all tenants at will or sufferance, whether they entered before or after the commencement of the action.

LEASE OBTAINED BY FRAUD is void.

JUDGMENT IN FORCIBLE ENTRY AND DETAINER is not evidence of title in an action of ejectment.

EJECTMENT. The opinion states the case.

Talbot, for appellants.

Hardin and Sharp, contra.

By Court, BOYLE, C. J. This is an appeal taken by the defendants from a judgment rendered for the plaintiff in an action of ejectment. Several exceptions were taken by the defendants in the progress of the trial in the court below; but they present points of no difficulty.

1. The lessor of the plaintiff, it appears, proved that he had leased the land in controversy to the defendants, and that the term for which it had been leased had expired before suit brought; and the court instructed the jury, that a landlord might maintain an action of ejectment against his tenant, who held over after the expiration of his lease, without showing any other title than his lease. Of the correctness of this instruction there can be no doubt. The law is settled in England, and has been frequently recognized in this country, that in such an action the landlord cannot be called upon to give any evidence of

his title, anterior to the lease; for having admitted the title of the landlord by taking the lease, the tenant is thereby estopped from controverting it.

2. It appeared that the lessor of the plaintiff had issued a writ of *habere facias possessionem*, upon a decree obtained by him for the land in controversy, against Elliott's heirs, and that the sheriff was about to turn out the defendants, who held the possession under Elliott's claim, without having any legal title when they took the lease from the lessor of the plaintiff; and the court instructed the jury, that, if the defendants entered under Elliott's claim, not having title, they were tenants at will or at sufferance, and might be turned out of possession by the sheriff, by virtue of the writ, whether they entered on the lands before or after the commencement of the suit; but that, if the lease had been obtained by the lessor of the plaintiff through fraud, it was void. To this instruction we can see no solid objection. Certainly, if the defendants entered under Elliott's claim, without title, they could be no more than tenants at the will of those having the legal title; and in that character, whether they entered before or after the bringing of the suit, the decree was equally obligatory upon them, and, of course, they might be lawfully evicted, by virtue of the *habere facias possessionem*, which issued upon the decree. And of the latter part of the instruction, if either party had a right to complain, it was the lessor of the plaintiff; for there was no evidence of fraud on his part, unless it were fraud for him to insist upon his right to the possession in virtue of the decree and writ of *habere facias possessionem*, and this, surely, cannot be seriously contended to amount to fraud.

3. The only other point which we deem material to be noticed, is the rejection by the court of two records of judgments for the defendants, in proceedings had by the lessor of the plaintiff against them, for a forcible entry and detainer of the land in dispute. In the rejection of these as evidence, we perceive no error. It is very true that a verdict and judgment in one action is evidence in another action between the same parties, and in which the same point is in issue; but here the same point is not in issue that was in issue in the action for the forcible entry and detainer. The right to lands is of various degrees, consisting of the possession, the right of possession; and the right of property, and the actions for the recovery of lands are, in like manner, of higher and lower grades; some involving only the naked possession, some the right of posses-

sion, and others again involving the right of property; and it is an established principle that a verdict and judgment in an action of a lower grade, is no bar to one of a higher. Now, it is plain, that in a proceeding for a forcible entry and detainer, under our act of assembly, it is the mere naked possession in fact, which is put in issue, and, of course, the judgment in such case can be no evidence in an action of ejectment, in which the right of entry is the point in issue.

Judgment affirmed with costs.

One who takes possession under a lease is estopped to deny his landlord's title: *Rogers v. Waller*, 9 Am. Dec. 758.

STANLEY v. EARL.

[5 LITTELL, 281.]

TITLE BY LIMITATIONS.—A person holding the adverse possession of property for a sufficient length of time, becomes vested with the title, and may recover the property of the former proprietor, if he should take possession of it; and this is true whether the adverse possession was held in this or another state.

DETINUE. The opinion states the case.

Sharp, for appellant.

Haggin, contra.

By Court, **BOYLE, C. J.** This is an appeal taken by the defendant from a judgment for the plaintiff in an action of detinue for slaves.

The questions of law which we deem material to be discussed, may be thus stated:

1. Whether, where a party has been in adverse possession of slaves for five years, he becomes thereby vested, in virtue of the statute of limitations, with such a right as to enable him to recover them of the former proprietor, who may have since obtained the possession?

2. Whether, where the adverse possession has been held in another state, the party can recover, without showing that by the laws of that state, such possession would give him a right to do so?

1. The first of these questions was decided in the affirmative by this court, in the case of *Thompson v. Caldwell*, 3 Lit. 136; and for that decision we had the authority of the unanimous

opinion of the court of appeals of Virginia, in the case of *Newberry's administrators v. Blakely*, 3 Hen. and Mun. 55, and of the supreme court of the United States, in the case of *Brent v. Chapman*, 5 Cranch, 358. Highly exalted, however, as those tribunals are, and justly respected as their opinions are entitled to be, they could not, we readily admit, justify the decision of this court, if it be erroneous in principle and repugnant to the established rules of law; and that it is so, is contended on the part of the appellant in this case; because, as it is asserted, the statute of limitations bars the remedy only and does not affect the right, and, therefore, it is inferred, that if the former proprietor, after the lapse of five years, obtains the possession of slaves, he will be remitted to his right, and may insist upon it in defense, although he had no remedy to recover them.

Were the premises of this argument true, we should have no hesitation in assenting to the correctness of the conclusion; but we cannot admit the truth of the premises. On the contrary, we assert that the remedy cannot be taken away or destroyed by the statute of limitations, without taking away or destroying the right.

In making this assertion, however, we must be understood to mean the legal right, as well as the legal remedy; for it is in that sense, only, that these terms must be used in the argument employed on the part of the appellant, to avail him anything; and understanding the terms in this limited sense, it is perfectly clear, that where there is no remedy, there is no right. The legal remedy may, no doubt, be modified or changed without destroying the legal right, or even impairing it, where the remedy, in its new shape, is not impaired; but wherever the remedy is destroyed or impaired, the legal right must be destroyed or impaired. The very idea of a legal right is, that it is one which is enforced and protected by the law; and as this can only be done by the remedy, the coercive means, whatever they may be, which the law affords for that purpose, it is plain that no one can have a legal right in that which another may take and apply to his use, and for doing so, the law will afford no redress. The legal right and the legal remedy are, therefore, correlative, correspondent and commensurable. The former implies the existence of the latter, and the latter implies the existence of the former, and neither can exist without the other. Hence it is that we are informed by Blackstone, and other elementary writers, "that wherever there is a legal right, there is a legal remedy," and "that the want of right and the want of remedy

are the same thing." These propositions are not indeed denied by those who controvert the doctrine we are urging; but, strange as it may appear, while they admit these propositions to be true, they at the same time assert that their converse is not so. But, surely, if the remedy may, in any case, be taken away or destroyed, and the legal right remain, there would then be a case in which there would be a legal right without a legal remedy, and it could not be true, that wherever there is a legal right, there is a legal remedy. And what notions of identity must they entertain, who, at the same time they tell us that "it may be truly and justly said, that the want of right and the want of remedy are the same thing," affirm, "that the want of remedy and the want of right are not the same thing." If the want of right is the same thing as the want of remedy, it is self-evident that the want of remedy must be the same thing as the want of right, and to affirm that it is not, is not less absurd than to affirm that the same thing may be, and not be, at the same time. With such reasoners as these we cannot enter the lists of controversy. They must be left to themselves, and with Lord Coke we can only say to them, "*Contra negantem principia non est disputandum*:" Co. Lit. 67a.

But the principle that the abrogation or destruction of the remedy abrogates or destroys the legal right, does not exist in theory only, but has been practically asserted in England ever since the existence of the statute of limitations in that country. By that statute, an entry upon land can only be made within twenty years after the right accrues, and, of course, an action of ejectment, which is founded upon the right of entry, cannot be maintained for the recovery of the possession after that period has elapsed. Under that provision of the statute, it was ruled in the case of *Stokes v. Berry*, 1 Salk. 421, "that if A. has had the possession of land adversely for twenty years, and then B. gets possession, upon which A. is put to his ejectment, though A. is plaintiff, yet the possession for twenty years shall be a good title in him, as if he had still been in possession; because, a possession for twenty years is like a descent, which tolls entry, and gives a right of possession which is sufficient to maintain an ejectment." The same point was decided in the case of *Alkins v. Hord*, 1 Burrow, 119, and in that case Lord Mansfield, in delivering the opinion of the court, emphatically says: "Twenty years adverse possession is a positive title to the defendant. It is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession." Again: It is provided by the statute of

limitations in England, that a writ of right, the highest remedy known to the law for the recovery of real estate, can only be brought upon the seising or possession of the demandant or his ancestor, within sixty years, and, as under the limitations for bringing an action of ejectment, an adverse possession for twenty years, is held not only to bar the remedy, but to take away the right of possession; so under the limitation for bringing a writ of right, it is held that a possession of sixty years is not only a bar to the action or remedy, but takes away the right of property, and vests it in the person thus seised. "So that the possession of land," as Blackstone observes, "in fee-simple, uninterruptedly for three-score years, is at present a sufficient title against all the world, and cannot be impeached by any dormant claim whatsoever:" 4 Tuck. Black. Com. 196.

We may, therefore, fairly conclude, we apprehend, that the statute of limitations is not only a bar to the remedy, but that it takes away the legal right. We are aware that there are cases in which a natural or moral right, as well as a legal right, may exist, as in the cases of contracts and of personal chattels, which are the products of man's own creative industry. In such cases, it is clear that the statute of limitations, though it may bar the remedy, and thereby take away the legal right, cannot affect the natural or moral right, for the latter is not like the former, the creature of civil law, but exists by the laws of nature, which no human laws can abrogate or destroy.

Hence, judges and jurists have not unfrequently used the expression, "that the statutes of limitation affect the remedy, but not the right," an expression which must necessarily be ambiguous from the ambiguity of the term right; but which ought always to be understood to be used with reference to the natural or moral right. The natural or moral right, even where the legal right is abrogated or extinguished, is of high respect in the estimation of law. It is held to be a sufficient consideration for a promise to pay a debt barred by the statute of limitations, and although it never can in itself, where the legal right is extinct, or does not exist, be the ground of action, it may, in many cases, constitute an availing defense, as in the case of contracts, within the statute of frauds; and we will not say that it might not do so, in a case where the former proprietor has, after the lapse of five years, gained the possession of a personal thing, which is the fruit of man's own creative industry, and is, therefore, by the laws of nature, the subject of property. But, with respect to the right of land, it is acknowledged to be

founded in positive law only, and, of course, can only be denominated a civil or legal right, in contradistinction to a natural or moral right. When, therefore, the remedy is gone, when the law ceases to afford the means to enforce and protect the right, the right itself necessarily ceases to exist. The right to slaves evidently stands upon the same foundation.

No man can, by the laws of nature, have dominion over his fellow-man, and property in slaves, therefore, can only exist where the necessary means is afforded by law to enforce the right of master, as well against the slaves themselves as against others. Thus, where a master takes his slave from one slave-holding state to another, his right will remain; because, by the laws of the state to which the slave is taken, a remedy is afforded to enforce and protect the master's right, and so if the slave escapes into a non-slaveholding state, the right of the master will still remain, not because the laws of such state afford a remedy, but because the constitution and laws of the United States give the means of reclaiming him; but, if the master voluntarily remove the slave to such non-slaveholding state, or if the slave escapes into a foreign country, which does not tolerate slavery, the master's right, so long as the slave remains there, is gone; because he has no remedy to enforce or protect it. It results, then, that the statute of limitations, by taking away the remedy, takes away the right to slaves.

If it be asked how the right becomes vested in the person who has had the adverse possession of slaves for five years, so as to enable him to recover them, we answer, because possession is alone a right, which the law gives a remedy to enforce and protect against all persons having no right, and is, of course, sufficient to authorize a recovery against the former proprietor, as well as against any other, the only right which he had being abrogated by the statute of limitations.

We are bound, therefore, to respond in the affirmative to the first question propounded, and the circuit court having so decided, its decision is correct.

2. The second question involves no difficulty. It is perfectly clear that the adverse possession of slaves being held by a person out this state, cannot prevent the statute of limitations from running; for the statute contains no saving of the right to maintain an action, because the thing possessed, or the person having the possession, is out of the state, and it must, therefore, operate as a bar to the recovery of the slaves, whether the possession was held in this or in any other state, for, as has been re-

peatedly decided by this court, the statute of limitations of this state, and not that of any other, must be the rule, with respect to the time in which an action may be brought in this country: 2 Bibb. 207. The circuit court having so decided this question, the decision is also correct.

Besides these questions, there is one which arises out of the refusal of the court to grant a new trial, upon the evidence given in the cause; but, with respect to this, it is sufficient to remark, that the evidence is of a character which would not justify the interposition of this court to award a new trial, in opposition to the opinion of the circuit court.

The judgment must be affirmed, with costs.

SCOTT v. COLEMAN.

[5 LITTELL, 349.]

FOREIGN ATTACHMENT.—It is a good defense that the amount sued for has been recovered of the defendants by a foreign attachment in another state.

PAYMENTS ON JUDGMENT, in proceedings by foreign attachment, are valid, though made before the issue of execution.

CONSTRUCTIVE SERVICE OF PROCESS and proceedings *in rem*, are authorized by the laws of most of the states, and judgments founded on such service or proceedings, are valid.

A JUDGMENT ENTERED IN ANOTHER STATE is entitled to full faith and credit here; but in no case is it to be given any greater effect here than it has at home.

IT IS PRESUMED IN SUPPORT OF JUDGMENT OF ANOTHER STATE, that the court had jurisdiction, and that the parties are concluded by its adjudication.

ONUS OF IMPEACHING a judgment rendered in another state, is on him who seeks to resist it.

LAWS OF OTHER STATES must be proved as facts.

ATTACHMENT of the debt sued upon may be pleaded in abatement.

RIGHT RESERVED TO GIVE SPECIAL MATTER in evidence can not embrace matters which could not be pleaded in bar.

SCHEDULE, EFFECT ON GENERAL TRANSFER.—A general transfer of all estate, real, personal and mixed, as at large, and fully explained by a schedule thereof annexed, will be confined to the property enumerated in the schedule.

ACKNOWLEDGMENTS OF AN ASSIGNOR, in relation to a claim made before its transfer, are evidence in an action between the assignee and the party against whom the claim exists.

ASSUMPSIT. The opinion states the case.

Haggin and Barry, for appellants.

Crillenden and Wickliffe, contra.

By Court, **MILLS, J.** To an action of assumpsit brought in the name of James Coleman, the surviving partner of Robert Megowan & Co., the appellants pleaded non-assumpsit, with leave to give special matter in evidence. On the trial the appellants gave in evidence, three records from the courts of the state of Pennsylvania, in which the demand due from them to Robert Megowan & Co., had been attached by foreign attachments in that state, where two of the partners resided, and one in the state of Pennsylvania, where the remaining partner resided, at which latter house, the demands set up by the appellee were contracted. On the failure of the house of Robert Megowan & Co., in this state, these attachments had issued against the house of the appellants there, two of them by creditors resident there, and one of them by George Trotter, one of the firm of the appellants, against the house of himself and partners in Philadelphia. In one of these records, there is a final judgment, to wit, that in which Trotter himself is plaintiff; in another there is a judgment *nisi*, and in the third there is no judgment. It was admitted on the trial, that the appellants, at their house in Philadelphia, had paid these judgments to the several plaintiffs therein, and the question arose, whether the appellants were entitled to a credit for the amount so paid in this action. The court below decided, that as there were no executions issued on said attachments, and the appellants had paid them without such executions, the payment could not avail them as a bar in this action; where the appellants insisted that the judgments alone were a sufficient authority for such payment, and that, as the laws of the state of Pennsylvania were not produced in their absence, the judgments must be taken as *prima facie* good authority, and as valid until impeached; and these are the questions presented for our consideration.

It must be granted to be a general principle of common law, that process must be executed, or the judgment rendered must be invalid, and that naming a person and styling him a party in the writ or pleadings alone, without giving notice of the proceeding, cannot bind or affect his interest. This rule is, however, made subject to many exceptions by statutory or local regulations in almost every country, and perhaps it is necessary for the ends of justice and the advancement of commerce, that such particular exceptions should exist. They generally authorize proceedings *in rem*, or by constructive service of process. Such appears to be the foreign attachments in England by the custom of London; such the laws of several of the American states, and

such is our proceeding by domestic attachment, in case of absconding debtors, and of our proceeding in chancery against absent defendants. As the different governments of America may and do institute such proceedings, it is competent for them to make judgments rendered therein, conditionally binding only, or binding at a certain state of the proceedings or at a certain time, or conclusively final or incontestable.

The constitution of the United States makes all judgments of any state evidence, and entitled to full faith and credit in every state; but it is settled by this court, in the case of *Rogers v. Coleman*, Hard. 413 [3 Am. Dec. 733], that this clause did not require greater faith and credit, or a more conclusive effect to be given to judgments or decrees when tendered as evidence in another state, than they are entitled to in the state where they are rendered. To what credit they are entitled at home, may, then, be often a subject of inquiry, when they are offered abroad, and, of course, the inquiry arises, must he who offers them, prove that they are binding where they are rendered, or he who opposes them show that they have but a partial effect? If the former is adopted, it would render the constitutional rule of but little effect, for the judgment or decree produced could prove nothing until its force at home was proved, as a matter of fact and law. We therefore conceive the general rule to be, that when the judgment or decree of a sister state is produced rendered by one of its tribunals, we must presume that tribunal had jurisdiction and authority, and that the act done in pursuance of that authority, does conclude and bind the parties named therein; and as to impeaching its full credit, the *onus probandi* lies on him who resists it. That it was competent for the appellee to show in this case that these judgments were not conclusive, or that they could not bind until execution was completed, we have no doubt; but we are also satisfied that it lay on him to do so, by producing or proving the law by which these proceedings were created.

We admit the authorities cited at bar, and that they conclusively show that payment in obedience to a foreign attachment in England could not be pleaded in bar to an action for the demand attached, unless such payment was made in obedience to execution also; and the reason seems to be, that after the emanation of execution, the plaintiff, before he completed it, was bound to give pledges to his original debtor to pay him the money if he should appear in a certain time, and disprove the debt. As this engagement was for the benefit of the orig-

inal debtor, it is but reasonable to compel his debtor to stand out until such security is given, or to deprive him of the bar. Such appears to have been the decision of the supreme court of New York, with regard to an attachment in the state of Maryland: 5 Johns. 101. Such also is the doctrine of Chancellor Kent: 4 Johns. Ch. 460. The supreme court of Pennsylvania, in *Myers v. Urich*, 1 Binn. 25, has decided the same way with regard to one of her own attachments. But we cannot see that the decision applies to the law under which these proceedings were had, and from the reports and elementary writers of that state, it seems they have more laws than one on the subject of attachments. If the appellee shall produce a law which suits these proceedings, and which shows that they are not conclusive without execution, we may then be able to fix a construction thereon which shall give these judgments no more weight than that for which he contends, or to adopt the decision of the courts of that state in his favor. This, however, was not done, and all such laws are and must be introduced into our courts of original jurisdiction as facts. Until this is done, that court ought to have taken these judgments as binding, and to have followed the general rule that a payment in satisfaction of such judgment is good without execution, and that it is never necessary for a person against whom a judgment is rendered to wait for an execution, but that it is his duty to act to the contrary. We, therefore, conceive that the judgments produced were evidence of an authority to the courts of Pennsylvania so to proceed, and that in the absence of the laws of Pennsylvania, or any evidence impeaching their validity without execution, the court below erred in attaching to these judgments no greater credence than what it did.

We would, however, not be understood as applying this to the exemplification of a record in which there is no judgment. There the court has yet done no act, or exercised no authority deciding upon or concluding the rights, or showing that the attaching creditors acquired any lien upon the debt on the service of the attachment, and, of course, this reasoning cannot apply. It is true that attachments pending have uniformly been held to furnish a good plea in abatement; but the appellants did not plead until the hour of pleading in abatement was over, and then offered a plea to the merits; therefore, they cannot be permitted to abate the action *pro tanto*. It is true that a right is reserved to give special matter in evidence, but

that cannot be construed as including anything more than what might have been specially pleaded in bar.

There is another point of considerable importance made in the progress of the cause. Evidence was given conducing to show that the appellee, or his trustee, had notice of the pendency of these attachments, and attempted to employ counsel to defend them, and some time afterwards acknowledged that this money, for which this suit was now brought, was paid in Philadelphia rightfully, or language to that effect, and reflected upon his trustee or assignees, hereinafter named, for proceeding to recover this demand. To ward off the effects of these acknowledgments, the appellee's counsel showed a deed of trust in which the appellant had conveyed his estate to William S. Dallam, and an assignment of this debt by Dallam, as trustee to Thomas H. Pindell, who afterwards assigned it to Richard Pindell, for whose use this suit was prosecuted. Afterwards the appellee himself assigned the same debt to Pindell, and confirmed the assignment of Dallam, his trustee; but this was after his acknowledgments aforesaid.

The counsel for the appellants moved the court to instruct the jury: 1. That the deed of trust from Coleman and Megowan to Dallam was fraudulent and void as relates to the creditors of the former; and, 2. That if the jury believed that the appellants paid the amount of the demand in suit to the creditors of the appellee, and that he, as surviving partner after the death of his partner, acknowledged and approved the payment and enjoyed the benefit thereof, the law was for the appellants.

As to the first of these instructions, the court decided that the appellants were not in a situation to ask it. The second, the court seemed to admit to be correct, if the appellee had not transferred the demand, leaving the inference that the transfers aforesaid destroyed the effect of said acknowledgments.

We shall consider this last instruction first; for there is no evidence of a transfer of the debt, except those produced by the appellant, and that made by Coleman was after his acknowledgments. If, then, the deed of trust did not pass the debt in question to Dallam, it is clear that Dallam could transfer no right to Pindell; and it is equally clear that if the deed does not transfer the debt, then the appellants had no concern with the deed, and could not ask an instruction about its fraudulent qualities, and the court decided the first point right.

Whether the deed does or does not transfer this debt depends upon its terms. They are very comprehensive, and pur-

port to pass "all the estate, real, personal and mixed, to which they (the grantors) were entitled, either in law or equity, within this state, the state of Ohio, at New Orleans, or elsewhere, whether held jointly, severally, or in common;" but these expressions immediately follow and limit its operation: "The situation, quantity, quality, amount and species of which said estate is more at large and fully explained by a schedule thereof annexed to this indenture, and intended to be recorded therewith." To the schedule, then, we must look for what is or is not embraced in the deed, and we do not conceive that anything more is included than what the schedule contains. In the schedule this debt is not embraced, and, of course, it was not conveyed by the deed, and Dallam had no authority to transfer the demand; nor could he confer any title from the deed, and the first valid transfer is that by Coleman after the acknowledgments proved. It then follows that the court ought to have given the last instruction positively, and could not have erred in declining to give the first, although the deed may be in law fraudulent. It is true, there is an authority in the deed to collect debts, and a power to act as attorney for the grantors; but these debts are the debts in the schedule, if any, and the power granted was over the estate enumerated in the same instrument, and no other.

We will return and notice an exception to one of the attachment records, which appears to have been relied on. It was insisted that Trotter could not be plaintiff in the attachment and also defendant. He was not so properly a defendant as garnishee. This may furnish grounds for an inference that the attachment was collusive; but we cannot say that the laws of Pennsylvania forbid it, or look into the regularity of the judgments of that state. Of course, it is not necessary to inquire whether such proceedings by parties in such an attitude can be tolerated here.

The judgment of the court below must, therefore, be reversed, and the verdict be set aside, and the cause be remanded for new proceedings, not inconsistent with this opinion.

On the effect of judgments of other states, see note to *Bartlet v. Knight*, 2 Am. Dec. 42; also, *Rogers v. Coleman*, 3 Id. 733; *Robinson v. Ward*, 5 Id. 327; *Bissell v. Briggs*, 6 Id. 88; *Aldrich v. Kinney*, 10 Id. 151; *Fischli v. Fischli*, 12 Id. 251. On mode of proving foreign laws: *Kenny v. Clarkson*, 3 Id. 336; *De Sobry v. De Laistre*, Id. 535; *Woodbridge v. Austin*, 4 Id. 740; *Bruckett v. Norton*, 10 Id. 179; and for a full discussion of this subject, note to *State v. Twitty*, 11 Id. 779; *Holley v. Holley*, 12 Id. 342.

CLAY v. CAPERTON.

[1 T. B. MONROE, 10.]

JUSTIFICATION BY OFFICER.—An officer, sued for taking property, may justify by showing an execution against his adversary which is regular upon its face.

ERROR to the Madison circuit. The opinion states the case.

Sharp, Attorney-general, for the plaintiffs.

Turner, for defendant.

By Court, BOYLE, C. J. This was an action of replevin, brought by Caperton against Clay and Kerley, for taking two horses. Clay pleaded not guilty and Kerley, by consent, had leave to give any special matter in evidence. On the trial, after Caperton had proved the taking of the horses by Kerley, in virtue of executions against Caperton's estate, issued at the suit of Clay upon two replevin bonds taken on a distress warrant for rent, from Mead and Caperton as his security, and returned to the office of William Kerley, a justice of the peace, who issued the executions thereon, Kerley, the defendant, produced the executions in evidence, and proved that he was an acting constable, and in virtue of the executions had seized the horses in question.

The court, on the motion of Kerley, for that purpose, refused to instruct the jury that he was justified in the seizure and detention by virtue of the executions, and, on the motion of Caperton, instructed the jury that the executions were void, and afforded no justification to the defendant, Kerley. To these opinions Kerley excepted; and a verdict and judgment having been entered against the defendants, they have brought the case to this court by writ of error.

1. It is obvious that the decision of the circuit court cannot be sustained upon legal principles. The executions were writs of *feri facias* in debt, for sums within the jurisdiction of a justice of the peace, and on their face were in all respects regular. In such a case, the executions, though they may be irregular and void as to the plaintiff in them, are, nevertheless, a sufficient justification to the constable, or officer who is bound to execute them.

2. For there is a clearly established distinction between the plaintiff, at whose suit an execution is issued, and the officer to whom it is directed to be executed. The former must show, if sued, a judgment which authorizes the execution; but it is

sufficient for the latter to show the execution, and, if that has nothing on its face which renders it irregular and void, it is to him a justification: 2 Bac. Ab.; title, Execution, letter P.

The judgment reversed, with costs, and the cause remanded for a new trial to be had, not inconsistent herewith.

SPEED'S EXECUTORS v. HANN.

[1 T. B. MCKENNA, 16.]

AMENDMENT OF JUDGMENT may be made in the lower court pending a writ of error.

JUDGMENT AGAINST EXECUTORS upon a covenant of their testator should be entered *de bonis testatoris* and not *de bonis propriis*.

AMENDMENTS, WHEN MAY BE MADE.—A judgment cannot be amended for error of the court after the lapse of the term; but clerical errors in its entry may be corrected at any time.

CORRECTING CLERICAL ERRORS.—An error in entering a judgment *de bonis propriis*, instead of *de bonis testatoris*, is a clerical error which the court may order corrected at any time.

MERGER OF ARTICLES OF AGREEMENT.—Articles of agreement do not merge into a conveyance subsequently executed in pursuance thereof.

A COVENANT contained in an agreement for the conveyance of a tract of land, to pay for what it may lack of a certain quantity is not performed by conveying the land, describing it to contain that quantity, if it do not, in fact, contain it.

COVENANT. Error to the Mercer circuit. The opinion states the case.

Haggin, for plaintiffs.

Crittenden, for defendant.

By Court, OWSLEY, J. On the twenty-fifth of February, 1805, the testator, James Speed, and John Hann, exchanged tracts of land, whereby, in consideration of a tract in Mercer county, received from Hann, the testator, Speed delivered to Hann a tract in Garrard; and, by an article of agreement, signed and sealed by the parties, of that date, and containing the terms of exchange more at large, the tract of Speed, in the county of Garrard, is described to contain two hundred and seven acres, and by a stipulation contained in the articles of agreement, Speed, on his part, covenanted that if the Garrard tract should contain less than two hundred and seven acres, he would pay said Hann at the rate of fifty shillings per acre for the deficiency.

After this, and on the twenty-second of May, 1805, the

testator, James Speed, executed to Hann a deed of conveyance for the Garrard tract, therein describing it to contain two hundred and nine acres, more or less, and setting out the metes and bounds at large; but in this deed there is no covenant or warranty as to the quantity of acres. Subsequent to the execution of this deed, Speed departed this life, and Hann brought an action of covenant upon the articles of agreement against his executors.

The declaration sets out as much of the covenant as is necessary for the purpose of the action, and contains an allegation averring the Garrard tract, which Speed gave in exchange, to contain but one hundred and ninety-three acres, instead of two hundred and seven acres, the quantity stipulated for by Speed in the articles of agreement.

Covenants performed was pleaded by one of the executors, and, by an agreement of the parties, he was allowed to avail himself, in defense of any matter which might be regularly pleaded.

Upon the trial, the articles of agreement were read in evidence to the jury by Hann; and after he had proved the deficiency in the quantity of acres, as charged in his declaration, the executor read in evidence the deed of conveyance, which was executed, by the testator, for the Garrard tract, and to which reference has been already made, and moved the court to instruct the jury that if they were satisfied, from the evidence, that the deed of conveyance was for the same land, in the original articles of agreement mentioned, and the plaintiff (Hann) received said deed, that the original contract was merged in said deed of conveyance, and that he could not recover upon the original contract; and also to instruct the jury that the deed from James Speed to the testator, for two hundred and nine acres of land, before referred to, supported the plea of covenants performed; and moreover to instruct the jury that if they gave interest, they should not go further back in their calculations than the date of the writ; but the motion was overruled, and each of the instructions, as asked, refused by the court.

A verdict was found by the jury in favor of Hann, and judgment *de bonis propriis* entered against the executors. To reverse that judgment, the executors have prosecuted this writ of error with supersedeas:

1. The judgment was, no doubt, incorrectly entered against the executors. The suit was brought against them upon the covenant of their testator, and, in strict propriety, the judgment

ought to have been entered *de bonis testatoris*, and not *de bonis propriis*. If, therefore, the judgment now stood as it was originally entered, we should have no hesitation in reversing it.

2. But the judgment does not remain as it was originally entered. Since the writ of error was sued out in this case, Hann applied to the court below, and obtained an order correcting the error, and the judgment now stands corrected in that court, against the executors *de bonis testatoris*. So that unless, as was contended in argument, it was incompetent for the court to amend the judgment, the irregularity in the entry first made, must be adjudged unavailing in this court.

3. Were the irregularity in entering the first judgment admitted to be an error, in the judgment of the court, it would follow as a necessary consequence, that the court below possessed no competent authority to make the amendment, for that amendment was made at a term subsequent to that at which the original judgment was entered; and no principle is better settled, and none more amply supported by authority, than that which forbids courts amending or correcting errors in their own judgments, after the lapse of the term in which they were rendered.

4. But if, instead of being an error in the judgment of the court, the irregularity in entering the first judgment be a clerical misprision, the principle is equally well settled, that is amendable by the court of original jurisdiction, though a writ of error be sued out to the judgment in this court.

5. And that the error, in entering the judgment, must be ascribed to the mistake of the clerk, and as such amendable, is fully established by the case of *Short v. Coffin*, 5 Burr. 2730. That was a case in which the judgment had been entered against the executor *de bonis propriis*, and after a writ of error had been brought, and *in nullo est erratum* pleaded, and argument, the judgment was amended by making it *de bonis testatoris*. While delivering the opinion of the court, Lord Mansfield observed that "This is not an error in the judgment of the court, in point of law, but a mere mistake of the clerk;" and in support of that opinion referred to a case in 2 Levi, 22, where the same principle had been adopted. Having disposed of the objections taken, to the manner in which the judgment was entered, we shall notice the questions which were made in the court below, on the motion of the executor for instructions to the jury.

6. That the court was correct in refusing to give the first branch of the instructions asked, is too obvious to require

elucidation by argument. The deed of conveyance is an instrument of no greater dignity, in contemplation of law, than the articles of agreement, which were signed, sealed, and delivered by the parties; and it is utterly incompatible with the established doctrine of the law, to suppose that one instrument of writing could be merged in another of the same dignity, or that by receiving the deed of conveyance, which contains no covenant, or warranty, as to the quantity of acres, any right of action which may have accrued to Hann, upon the stipulation for quantity, in the articles of agreement, could be made to grow out of the deed of conveyance.

7. Nor can we admit that the court erred in refusing to instruct the jury that the execution of the deed of conveyance by Speed, was such a compliance with the stipulations of the articles of agreement, as to support the plea of covenants performed. The execution of that deed was, no doubt, a performance of the stipulation of Speed, contained in the articles of agreement, to convey the Garrard tract; but the quantity of acres conveyed, is proved to be less than the quantity sold, and it is impossible to perceive how the execution of a deed for a less quantity can have performed the covenant contained in the article, to pay for the deficiency in the quantity.

8. And with respect to the refusal of the court to instruct the court as to the calculation of interest, we have been incapable of discerning the principle upon which the counsel of executors can have predicated his hopes of success. If, in point of fact, the quantity of acres in the Garrard tract is less than two hundred and seven, there was such a breach of the covenant of Speed, for quantity, as would have authorized a recovery long before the date of the writ, and, of course, the time of suing out the writ cannot fix the date to which the jury should have been confined in making their calculation.

The judgment must, therefore, be affirmed, with costs and damages.

WHEN MERGER TAKES PLACE.—In contracts, whenever an obligation or a liability of an inferior degree is changed into one of a superior degree, as a simple contract debt or liability into a specialty, or an obligation into a judgment, the former is merged in the latter: *Wann v. McNulty*, 2 Gilm. 355; *Groverman v. Diffenderffer*, 11 Gill. & J. 11; *Drake v. Mitchell*, 3 East, 251. "The general rule is that by a judgment at law, or a decree in chancery, the contract or instrument upon which the proceeding is based, becomes entirely merged in the judgment. By the judgment of the court it loses all of its force and vitality and ceases to bind the parties to its execution. Its force and effect are then expended and all remaining legal liability is transferred to

the judgment or decree. Once becoming merged in the judgment, no further action at law, or suit in equity, can be maintained on the instrument. All rights and liabilities originally imposed by, or growing out of, the instrument or agreement, terminate with the judgment of the court." *Wayman v. Cochran*, 35 Ill. 152; *Runnamaker v. Cordray*, 54 Id. 303. "But merger takes place only where the debt is one and the parties to the securities are identical." *Jones v. Johnson*, 3 Watts & Serg. 276. And where the higher security is not between the same parties, nor for the same amount, but is intended to be merely a collateral security, the inferior will not merge in the higher: *Duy v. Seal*, 14 Johns. 404; *Davis v. Anable*, 2 Hill, 339. In the *United States v. Lyman*, 1 Mason, 482, Story, J., says: "I admit the doctrine that in general a higher security, taken from the debtor himself, extinguishes the original contract. But this proceeds upon a presumption of law, that it is taken in satisfaction of the original debt; for if it appear otherwise upon the face of the security it will not operate as an extinguishment. . . . In case of a higher security of a third person the law does not presume that it was to be taken in satisfaction of the debt as it does when given by the debtor himself." A parol contract or implied assumpsit merges in a written agreement: *Ferguson v. Weatherford*, 4 J. J. Marsh. 195. And all the oral negotiations or stipulations between the parties, which preceded or accompanied the execution of an instrument in writing, are to be regarded as merged in it: *Oiler v. Gard*, 23 Ind. 212; *Vanderkarr v. Thompson*, 19 Mich. 82. So also an oral agreement by the vendor of real estate, made before the execution of the deed, to procure for the vendee an outstanding title to the land conveyed, is merged in the covenants of the deed: *Coleman v. Hart*, 25 Ind. 256; *Martin v. Hamlin*, 18 Mich. 354.

JUDGMENT AGAINST ONE JOINT DEBTOR MERGES RIGHT OF ACTION AGAINST ANOTHER FOR SAME DEBT.—A contrary doctrine was laid down by C. J. Marshall, in *Sheehy v. Manderville*, 6 Cranch, 253; and followed in *Sneed v. Wiester*, 2 A. K. Marsh. 277; and *Treasurers v. Bates*, 2 Bailey, 392. But the decision in *Sheehy v. Manderville*, was expressly overruled in *Mason v. Eldred*, 6 Wall. 231; and is in direct conflict with a long line of authorities in this country and in England: *Robertson v. Smith*, 18 Johns. 459; *Ward v. Johnson*, 13 Mass. 148; *King v. Hoare*, 13 Mees. & Wels. 495; *Smith v. Black*, 9 Serg. & R. 142; *Wann v. McNulty*, 2 Gilm. 355; *Root v. Dill*, 38 Ind. 169; *Suydam v. Barber*, 18 N. Y. 468; *Olmstead v. Webster*, 4 N. Y. 413; Freeman on Judgments, sec. 232. In *Mason v. Eldred*, 6 Wall. 231, the court say: "The general doctrine maintained in England and the United States may be briefly stated: A judgment against one upon a joint contract of several persons bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment."

WHEN MERGER DOES NOT TAKE PLACE.—A superior right is never merged in an inferior one: *Myers v. Hewitt*, 16 Ohio, 453. Nor is one security merged in another of equal degree: *Andrews v. Smith*, 9 Wend. 53; *Weakly v. Bell*, 9 Watts. 280. A vendor's lien is not merged in a mortgage on the premises sold to secure the payment of the purchase-money: *Anketell v. Converse*, 17 Ohio St. 11; *Neil v. Kinney*, 11 Id. 58; *Boos v. Ewing*, 17 Ohio, 500. The right of action on an account is not merged in a note which, by agreement, is only to be a discharge of the account when paid: *Proctor v. Mather*, 3 B. Mon. 353. In *McNaughten v. Partridge*, 11 Ohio, 223, it was

held "that to give a note or other security for a prior engagement is no discharge of the original agreement unless the latter be paid or performed, or unless it was the understanding of the parties that the latter should extinguish the former." So in *Shaw v. Burton*, 5 Mo. 478, it was held that a deed given after a note, for the same sum, and to be void if the amount was paid by a certain day, did not merge the note, unless it was shown that the deed was made and accepted as a satisfaction of the note. A warrant of attorney to confess judgments upon a debt due directly from the defendant to the plaintiff, does not merge the original debt: *Sloo v. Lea*, 18 Ohio, 279; *Norris v. Aylett*, 2 Camp. 328.

MERGER OF ESTATES IN REALTY.—Whenever a greater and a less estate meet and coincide in the same person, in the same right, without any intermediate estate, the less estate is immediately merged in the greater: *Fox v. Long*, 8 Bush. 551; *Allen v. Anderson*, 44 Ind. 325. Hence, it was held, where a man conveyed his land in fee, and took a lease for life, and this deed not having been recorded, another deed was made of the same land, without any other consideration and without any reservation or recognition of the lease, that the latter deed merged the lease for life, although the parties did not so intend it: *Sharp v. Carile*, 5 Dana, 489. This is the strict rule of law, but in equity it is considerably modified. "The rule in equity is the same as at law, with this modification, that at law it is invariable and inflexible. In equity it is controlled by the expressed or implied intention of the party in whom the interest or estates unite:" *James v. Morey*, 2 Cow. 248, 14 Am. Dec. 475. Hence, the union of the legal and the equitable estate in the same person does not necessarily effect a merger of the equitable estate, where the interest of the parties, or the equitable rights of innocent third persons, require them to be kept distinct: *Champney v. Coope*, 32 N. Y. 543; *Bascom v. Smith*, 34 Id. 320; *Huebsch v. Schell*, 81 Ill. 281; *Edgerton v. Young*, 43 Id. 464; *Fowler v. Fay*, 62 Id. 375; *Millsbaugh v. McBride*, 7 Paige, 509; *Skeel v. Spraker*, 8 Id. 182; *Purdy v. Huntington*, 42 N. Y. 334.

BELL v. LAYMAN.

[1 T. B. MORRIS, 39.]

CO-TENANCY—CONVERSION.—One co-tenant may maintain trover against another for the conversion of their common property.

NON-JOINDER OF CO-TENANT.—If an action be brought by one co-tenant against a stranger, the non-joinder of the others must be taken advantage of by a plea in abatement unless it appears on the face of the complaint; in which case it may be taken advantage of by demurrer or in arrest of judgment.

CONVERSION, WHAT IS NOT.—The use of property by a stranger in partnership with one of the co-tenants is not a conversion; nor is such stranger or his partner liable for a conversion because the property is levied upon and sold under process against them.

TROVER and conversion. Error to the Lawrence circuit. The opinion states the case.

Daniel, for the plaintiff.

Triplett and Short, for the defendants.

By Court, BOYLE, C. J. This was an action brought by W. and E. Layman, against Harrison Bell and John Loder, for the conversion of two thirds of an auger for boring wells. The suit was abated, as to Loder, by the return of the sheriff, and Bell pleaded the general issue, on the trial of which it was proved that the plaintiffs and Loder were the joint owners of the auger in question, and that Loder took the auger to bore a well in partnership with Bell; and, after they had used it for that purpose, the auger was taken and sold in virtue of an attachment for Loder and Bell's debt. On this evidence, Bell moved the court to instruct the jury to find as in a case of nonsuit, but the court overruled the motion and he excepted.

The jury having found a verdict for the plaintiffs, Bell moved the court to arrest the judgment, on the ground that an action of trover and conversion would not lie for the two thirds of the auger; but the court overruled the motion, and rendered judgment for the plaintiffs, to which Bell prosecutes this writ of error.

1. We will first consider the point made on the motion in arrest of judgment. It is well settled, where one of several part owners of a thing, whether they be joint tenants or tenants in common, does an act which amounts to a conversion; and, as in such an action, the plaintiffs could only recover the value of their shares, we can see no rational ground of objection to their asserting, in their writ and declaration, a claim to so much only as they have a right to recover.

2. It is true, where the action is brought against a stranger, all the joint tenants in common ought to join; but, if they do not, the matter can be taken advantage of, to defeat the recovery, to the extent of the plaintiff's right only, by pleading it in abatement; and, to the validity of such a plea, it is obviously essential, as one joint tenant or tenant in common can maintain the action against another, that the plea should show that some person, not a party to the action, was a part owner of the thing with the plaintiff.

3. If, indeed, such appeared to be the case from the declaration itself, the defendant might, no doubt, without pleading it, take advantage of that matter by demurrer or in arrest of judgment; for it can never be necessary for the defendant to plead that which the plaintiff himself has shown by his own pleadings. But, in this case, although the declaration shows that the plaintiffs are owners in part only, of the thing for which they sue, it does not appear that the defendant is not owner of the

residue, and therefore there is not apparent upon the face of the declaration, sufficient to show that the action was improperly brought for the two thirds of the auger only; and, consequently, the circuit court was correct in overruling the motion in arrest of judgment.

4. It remains, then, in the second place, to inquire whether or not the circuit court erred in refusing to instruct the jury to find as in case of a nonsuit. To support the action, two parts were necessary to be proved: first, property in the plaintiffs; and, secondly, a conversion by the defendant Bell. Property in the plaintiffs, to the extent necessary to maintain the action, was indisputably proved; so that the only point of controversy, is as to the proof of a conversion by Bell. The use of the auger by him, in partnership with Loder, who was a joint owner with the plaintiffs, cannot, we imagine, be pretended to amount to a conversion.

5. The only other fact which the proof conduces to establish, that can be relied on as a conversion of the auger by Bell is that it was taken and sold for his and Loder's debt; but this, we think, cannot amount, upon legal principles, to a conversion.

6. Had the auger been taken and sold by virtue of the attachment for the sole debt of Bell, there would have been some color for supposing it to be a conversion by him. Even in that case, however, unless there had been some proof conducing to show his assent to the seizure and sale, we should have had some hesitation in saying that it amounted to a conversion. He would, doubtlessly, have been liable for the amount to which his own debt had been thereby extinguished; but a different form of action would appear to have been a more appropriate remedy. Be that, however, as it may, it is not material now to decide; for the auger was taken and sold, not for his sole debt, but for the joint debt of him and Loder; and if the seizure and sale did not amount to a conversion by the latter, it is apparent that they cannot be considered to amount to a conversion by the former; for, as the seizure and sale were made for the joint debt of both of them, they must have both been equally in default; and if both were not guilty of a conversion, neither can be.

7. That Loder could not thereby be charged with the conversion of the auger, upon legal principles, is evident. Even if he had voluntarily sold the property himself, in discharge of the debt, he would not have been liable for a conversion; for, being a joint owner with the plaintiffs, nothing short of a de-

struction of the auger can amount to a conversion by him, for which he would be liable in this form of action, and a sale by him could not be deemed equivalent to a destruction of the auger: 3 Selw. N. P. 1154, 1155, and note 8.

The judgment must be reversed, with costs, and the cause remanded for a new trial to be had, not inconsistent herewith.

READ v. BANK OF KENTUCKY.

[1 T. B. MORRIS, 91.]

- A PROTEST is essential to a recovery on a foreign bill of exchange.
- A PROTEST MAY BE MADE by a private person in the presence of two witnesses if no notary can be obtained, and it is no objection to the protest that the person making it is a stockholder in the bank holding the bill.
- THE WITNESSES TO THE PROTEST need not subscribe their names. If the protest is drawn up a few hours after the demand, the necessity of noting the bill at the moment is superseded.
- COSTS OF PROTEST cannot be charged where the protest is made by a private individual.

DEBT. Error to the Washington circuit. The opinion states the case.

Haggin and Huston, for the plaintiff.

Crillenden and Wickliffe, for the defendants.

By Court, **MILLS, J.** This writ of error is sued out to reverse a judgment obtained by the bank against the last indorser, in an action of debt, on a negotiable note discounted by the institution.

A demurrer to the declaration was filed and overruled. The only question arising on the demurrer is, that it is not stated in the declaration that the note, when it came to maturity, was legally protested by a notary public. It is averred that the note was duly and legally protested by Raphael Lancaster, in the presence of Daniel Thompson and Joseph B. Lancaster, there being then no notary public at the time in the place. It is, therefore, urged that no recovery on such protest can be had against the indorser.

The proof corresponded with this allegation, and the same question was made on a motion to instruct the jury, and also by the pleadings. The answer to the demurrer will, of course, dispose of the question in all its different forms.

1. It is true that a protest is essential to a recovery on a for-

aign bill of exchange, the rank of which belongs to this note, and it is said to enter into the substance of this bill, according to the custom of merchants.

2. No doubt, a notary public was first introduced to furnish convenient evidence of the facts contained in the protest, viz., of the presentment of the bill, a demand of its contents, and the failure of payment. These, certified by the notary, were allowed to supersede the necessity of other proof, and it at last became to be the evidence of the facts known to the law, and is, therefore, required. It is now unnecessary to inquire into the merits of this evidence, whether it is in fact and in nature more certain and infallible than proof of another character; for the law-merchant has already placed it on the highest ground. But although a protest is essential to a recovery on such bill, and a notary is the proper officer to certify it, yet it does not follow that if there is no notary, all recourse on the bill must be lost. It is more agreeable to the analogy of our law that inferior evidence in such case should be allowed. This inferior evidence the law has been careful to select, and not to trust to every kind. Hence some substantial person must protest the bill in the presence of two credible witnesses, who can prove the fact, the person protesting being allowed to draw up and certify the fact in usual form: Chitty on [Bills, Am. ed., 280; Swift, 281. This mode seems to have been substantially pursued.

3. It is objected that the person who presented the bill was a stockholder in the bank at the time of the protest, though not at the time of his giving evidence. We perceive no solid reasons for this objection. The disinterested persons who were called upon to attest the transaction, are designed by the law to be the witnesses to prove the facts, and to them there is no objection; even if the objection against the person protesting is tenable.

4. It is further objected, that at the moment the note was presented, it was not noted instantly, but in a few hours afterwards, the protest was drawn up, and notice sent to the plaintiff in error, and some days afterwards, the two witnesses first called upon attested the protest. On these facts, no solid objection to the protest can be founded. The protest was drawn up so soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment; and as to the attestation of the witnesses, we have found no authority requiring them to attest the trans-

action by subscribing their names. The protest states that it was done in their presence, and their evidence corresponds with the fact as stated.

6. The jury rendered their verdict for only one cent in damages, and the court rendered judgment for the current interest from the date of the note, and this is assigned for error. There is no doubt that interest was recoverable on the demand by law, and the criterion or per centum is fixed and certain. It has been decided by this court, in the case of *Dicken v. Smith*, 1 Lit. 209, that a court can, *ex officio*, assess damages, and lessen or set aside a verdict in covenant for enormous damages where the instrument itself pointed out a certain criterion; and it might be plausibly, if not soundly urged, that on the same principle, a court might increase the damages where, as in this case, a certain criterion is given.

6. But without giving any determinate opinion on this point, an act of assembly on the subject of interest, 2 Dig. L. R. 675, has settled this question. Its expressions are: "All debts founded on any specialty, bill, or note, in writing, ascertaining the demand, shall carry interest in the same manner as debts due on a bond or bill with a penalty, under seal." It may be remarked, that the act does not confine itself to writings stipulating, *totidem verbis*, the payment of a debt; but includes debts founded on a bill or writing, ascertaining the demand. And, although in this instance, the undertaking of the defendant was conditional only, yet the action is founded on the writing, and by it the demand is ascertained. The same act proceeds to direct the addition of interest, calculated by the clerk. There is, then, no error in the judgment of the court below allowing interest.

7. But the court below gave judgment for the costs of protest, and this is assigned for error. As the action is at common law, and not under the statute, and the protest was made by a private individual who had no right to charge fees for protesting, it was erroneous to add this in the judgment, and to that extent it must be corrected.

8. The judgment must, therefore, be reversed, and the cause be remanded, with directions to enter judgment in conformity with this opinion; and each party must bear their own costs in this court.

COX v. NELSON.

[1 T. B. MONROE, 24.]

AN EXECUTION IRREGULARLY ISSUED to another county is voidable only.

A sale under it is valid.

PURCHASERS AT EXECUTION SALES are not bound by the irregular acts of the officer or plaintiffs in which they do not participate.

THE QUASHING OF AN EXECUTION irregularly issued does not invalidate a sale previously made under it.

MOTION. Error to the Nelson circuit. The opinion states the case.

Haggin and Huston, for the plaintiff.

B. Hardin, *contra*.

By Court, MILLS, J. This is a notice and motion to quash the sale of lands by execution, and it was overruled. The grounds set out in the notice are numerous, as well as those attempted in the proof; but so far as fraud or duress on the part of the purchaser are relied on, the proof failed, and we deem it unnecessary to detail any of the circumstances or grounds, except one.

The plaintiff in the motion, who was defendant in the execution, resided, before and ever since the date of the judgment, in Nelson county, where the judgment was rendered, and the first execution issued thereon was directed to the county of Breckinridge, and by virtue of this execution the sale in question was made; and it is contended, on the authority of the case of *Mason v. Rogers, etc.*, at the last term of this court, that the sale ought to have been quashed. We say the sale; for there is no attempt, on the part of the mover, to quash the execution. There was no proof whether that the defendant in the execution, now plaintiff in the motion, had or had not removed his effects from the county, and the purchaser of the land was no party, but a stranger to the execution.

1. Assuming the case of *Mason and Rogers* as fixing the construction of the statute relative to the transmission of an execution beyond the territorial limits of a county, this case presents the inquiry, whether executions sent to other counties are void or voidable only. If void, there is no doubt this sale can not stand; if voidable only, it will not follow that the sale is bad, because the execution is erroneous. We view the distinction taken in the books between a legal proceeding irregular, and that which is erroneous merely, as sound, and

one which, for the peace of society and the security of rights acquired by legal proceedings, ought to be adhered to; for, according to that distinction, any rights acquired by third persons under a proceeding erroneous merely, are, in general, to be protected, notwithstanding the proceedings may afterwards be reversed for error. Hence, it has been often held, that after a judgment was reversed for error only, the party obtaining the reversal is not entitled to restitution in kind of what has been taken and sold to satisfy the judgment, but only to the money made and paid to his adversary. This principle, we conceive, ought to apply to and govern executions which are only erroneous. The purchaser of an estate under them ought not to have his title impeached, because of the error. The only points to which he is to look are, whether there is a proper authority to make the sale, and a proper officer engaged in making it.

2. It is also in the general true, that wheresoever an officer can justify under a writ, he can pass a title by a sale under it. If, to him, it is a good authority to act, the purchaser claiming under him will acquire a good title. Whether this may be true, to its whole extent, with regard to the sale of land by *fiery facias*, we need not now determine. One thing is, however, clear on this point, when lands were made liable, they were subjected to judgments, and hence it has been held, that a purchaser claiming lands under execution must not only produce an execution, but a judgment. If, in any case, then, a purchaser could acquire title to a chattel, by virtue of an execution, valid on its face, but issued without a judgment, or on an invalid one, it is not necessary for us to say now, that he could, by such an execution, acquire a title to lands, when the act requires a judgment, and in this case there is a valid judgment.

3. It has, moreover, been held that the purchaser was not bound by irregular acts in the officer or plaintiff, in which he did not participate. These principles have been adopted by this court in the following cases: *McKinney v. Scott*, 1 Bibb. 155; *Reardon v. Searcy*, 2 Id. 202; *Coleman v. Traube*, Id. 518; *Lawrence v. Speed*, Id. 401; *Haydon v. Dunlop*, 3 Id. 216. These cases go far in principle to support the sale in question. In some of these cases, a distinction, which we still approve, is taken between those cases where the statute has pronounced the sale void, and those where the directory part of the statute has not been pursued; and, in the latter case, the sale, when made to a person innocent of the deviation from the statute, is

held good. Such is the present case. The statute has not pronounced it void.

4. It is clear, that according to the construction given in *Mason v. Rogers*, an execution may go out of the county, in cases where the defendant in the execution has moved himself or effects from the county. What, then, is the duty of the officer to do, when he receives such execution, coming from another county? He may be bound to know many facts *in pais*, officially, within his own bailiwick, but in others he is bound to know nothing. The execution may have come from one extreme of the state to another. Is he bound to retrace it to the county whence it came, and there ascertain where the defendant resided, and whether he had removed himself or his effects? When he got there, the means of ascertaining these facts, *in pais*, might not be in his power; and yet, if he does not proceed, and these facts exist, he would become liable to the plaintiff. The same inconveniences would be imposed on every purchaser. By this means all sales of property on executions out of the county would become so hazardous, that no fair price could be obtained, and the allowance granted to send them out of the county, would be rendered of no use to the creditor, or highly injurious to the debtor. As an execution can go beyond the county in some cases, we conceive that the correct doctrine is, the sheriff and all purchasers have a right to presume that it is legally sent, and to act accordingly; and that, if it shall thereafter be found that it was sent improperly, the title sold under it ought not to be disturbed.

5. On analogous principles, the sale of a slave by an administrator who has only a limited and special power to sell, has been held good as to the purchaser, notwithstanding the sale was wrongfully made, and the heir or distributee has been left to his remedy against the administrator: *Stamps v. Beaty*, Hard. 337. So, in this case, if an execution is wrongfully sent, the defendant, who is injured thereby, may have his redress against the plaintiff, instead of taking it against either the sheriff or purchaser.

6. If it is necessary to give such redress, that the execution should be quashed (a point not now before us), it will not follow that the title of the purchaser should fall with it.

Upon the whole, we conceive that for this cause only, the title of the purchaser in this case ought not to be shaken, and the judgment of the court below must be affirmed, with costs.

EFFECT OF QUASHING EXECUTION ON SALE MADE UNDER IT.—“Where a purchase has been made under a writ by a stranger to the action, courts will not usually quash it, where the purchase has been made in good faith:” Freeman on Executions, sec. 80; *Hedges v. Mace*, 72 Ill. 472; *Moore v. Neill*, 39 Id. 256; *Mulford v. Statzenback*, 46 Id. 303; *Harris v. Lester*, 80 Id. 307; *Boles v. Johnston*, 23 Cal. 226; *Amos v. Stockton*, 3 J. J. Marsh. 639; *Bryan v. Berry*, 8 Cal. 130; *Stewart v. Croes*, 5 Gilm. 442; *Day v. Graham*, 1 Gilm. 435; *Hitchcock v. Roney*, 17 Ill. 231; *Ballance v. Loomis*, 22 Id. 82. In *Winchester v. Winchester*, 1 Head. 460, the court say: “Now we think it may be laid down as a general rule that whenever a court of chancery, or other court of general jurisdiction, possesses jurisdiction of the subject-matter of litigation, and has acquired jurisdiction of the parties, that, as to third parties interested under its judgments and decrees, its proceedings can not be held void after a final disposition of the cause.” And in *Whitman v. Taylor*, 60 Mo. 127, the court say: “In the present case, the rights of third persons are involved, and the irregularity cannot avail in this collateral action. * * * While the irregularity might be sufficient to quash the execution issued, or a sale made under it, if a motion for that purpose had been made in time; yet, where the property has got into the hands of an innocent purchaser, under a sale and sheriff’s deed, made under such an execution, the execution not being absolutely void, the purchaser’s title cannot be defeated in this collateral way:” *Waddell v. Williams*, 50 Mo. 216; *Warren v. Twilley*, 10 Md. 39; *Park v. Darling*, 4 Cush. 197. “A purchaser at a sheriff’s sale has the right to rely upon the judgment, levy and deed; these being valid, an innocent purchaser cannot be affected by other irregularities:” *Cooley v. Wilson*, 42 Iowa, 425; *Shaffer v. Bolander*, 4 G. Greene, 201; *Frakes v. Brown*, 2 Blackf. 295; *Armstrong v. Jackson*, 1 Id. 210. “It would be dangerous to purchasers, and ruinous to defendants in execution to require bidders to see that the sheriff had complied with all his duties:” *Mordecai v. Speight*, 3 Dev. L. 428; *Sullivan v. Hearnden*, 11 Ga. 294. “The general principle to be deduced from all the authorities is, that the title of a purchaser, not himself in fault, cannot be impaired at law nor in equity, by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected by a direct proceeding. If not so corrected, they cannot be made available by way of a collateral attack on the purchaser’s title:” Freeman on Executions, sec. 339. But where the court did not acquire jurisdiction of the parties, because no legal service of summons was made upon them, the sheriff’s deed was held to be absolutely void: *Hewitt v. Weatherby*, 57 Mo. 276.

HANCOCK’S HEIRS v. HANCOCK.

[1 T. B. MONROE, 121.]

CONTRACT TO CONVEY.—One who has contracted to convey lands will not be compelled to convey a part to the grantee of his obligee, but such grantee is entitled to a decree compelling a conveyance of the whole to his grantor, as provided in the original contract.

SURVEY, WHEN ORDERED.—If it appear that complainant is entitled to a conveyance of land, but its quantity and location are uncertain, a survey should be ordered.

BILL in chancery. Error to the Franklin circuit. The opinion states the case.

Monroe, for the plaintiffs.

Sharp, for the defendant.

By Court, *MILLS*, J. This bill is brought for the conveyance of a small piece of land, for which James Hancock gave his bond to the complainant, being part of one hundred acres for which Gore, who held the legal estate, gave his bond to said James Hancock. Gore also gave his bond for one hundred acres to the complainant, and the bond of James Hancock to the complainant is for that part of James Hancock's land which lies between the lines of the complainant and Steele's branch, which quantity is declared, by the bond on which the bill is filed, to be uncertain and unknown.

The heirs of Gore answer, stating that their ancestor had tendered a conveyance in his life-time to James Hancock, and that since his death and since the filing of this bill, and before the service of process, they have conveyed to James Hancock, and taken in the bond of their ancestor, which is filed in another suit in the same court, but does not appear in this.

Witnesses prove that they know the objects called for in the bond from Gore to James Hancock; but there is no survey in the cause exhibiting these objects, and the court certifies that the survey filed was rejected, and it composes no part of the record, and it is accordingly not copied in the record before us, yet the decree is by metes and bounds. Whether these metes and bounds compose any part of the land sold by Gore to either the complainant or James Hancock, or whether they contain a part of the land conveyed to James Hancock by the heirs of Gore, or any part of the land for which the legal title is in Gore's heirs, is wholly uncertain, and as far as we can ascertain the bounds of the decree, they are arbitrarily fixed by the chancellor, we know not where, and although the chancellor states the quantity of land in the decree, there is not the least proof of that quantity in the record.

1. The decree is not only against James Hancock, who gave his bond to convey to the complainant, but also against the heirs of Gore, who have already conveyed to James Hancock. It is clear that if the heirs of Gore have conveyed to James Hancock the land which they were bound to convey by their ancestor's bond, they have nothing to do with this controversy. If, on the contrary, as the bill seems to insinuate, the heirs a

Gore and James Hancock have, by the conveyance to the latter, changed the position of the land, and left out land which the bond to James Hancock covered, and also covered by the bond of James Hancock to the complainant, it was competent for the chancellor to set the matter right and to fix the land to its ancient position, and then if Gore's heirs had not already conveyed it to James Hancock, to compel them to do so, and he to convey to the complainant; and this is the course that the chancellor ought to have pursued.

2. It is a case where the complainant has made out a title to some relief against James Hancock, and eventual relief against Gore's heirs, if it should be found that they, by combination with said James, have changed the position of the land, and yet hold the legal estate on the ground as formerly described. But the extent and position of that relief cannot be ascertained from the proof, and the defect of proof is of that nature as not to warrant a dismissal of the bill, but might have been supplied by a surveyor or commissioner, as decided by this court in the case of *Farmer v. Samuel*, 4 Litt. 187 [14 Am. Dec. 106]. The position of the two bonds executed by Gore to Hancock ought to be thus ascertained, and that would give the land included in the bond of James Hancock to the complainant, and would, also, discover whether the deed of Gore's heirs to James Hancock embraces the ground included in Gore's bond to him.

3. There is, also, another objection to the decree. There was a balance due from the complainant to James Hancock, which depends in amount upon the quantity of land, and the court below having fixed the quantity without a survey and without proof, directed the money to be tendered and the conveyance made *in pais*, when these matters ought to be settled on record, under the eye of the court, as was held in the case before cited, and other cases.

The decree must, therefore, be reversed, with costs, and the cause be remanded, with directions there to entertain such proceedings, and render such decree as may not be inconsistent with this opinion.

BLUE v. KIBBY.

[1 T. B. MONROE, 195.]

IMPEACHING A WITNESS.—To impeach a witness, it is proper to inquire what is his general character, as well as to inquire whether he is entitled to credit upon oath.

NEW TRIAL will not be granted for error in instructions, nor on the ground of surprise, unless the evidence is before the appellate court to enable it to determine whether any error has been committed.

TROVER and conversion. Appeal from the Union circuit. The opinion states the case.

Crillenden, for appellant.

Bibb, for appellee.

By Court, **MILLS, J.** The appellee declared in trover against the appellants, in two counts, for the conversion of three stills, and the necessary apparatus for distilling. On the trial of the issue of not guilty, the appellee had introduced a witness who deposed in his favor, and to impeach him, the appellant introduced another witness, and asked him, what was the general character of the appellee's witness. The court refused to permit the question to be answered, being of opinion that the only proper question was, whether, from his knowledge of the general character of the witness, did he believe him entitled to credit, when on oath. The jury found and judgment was rendered for the appellee, and to reverse it, this appeal is prosecuted. It is true in the case of *Mobley v. Hamit*, 1 Marsh. 591, an opinion was intimated which would warrant the decision of the court below on impeaching the appellee's witness; but this court, on reconsidering that question, in the case of *Hume v. Scott*, 3 Marsh. 260, has since come to a different conclusion; and upon a review of the latter case, we still approve it as tenable, and accordingly, the judgment of the court below cannot stand.

There were divers instructions moved for, and some given to the jury, and some refused, by the court below. They involve questions which may again arise in another trial of this cause, yet we can not notice them. The counsel for the appellant must have supposed, that this court could notice the impropriety of instructions without seeing the evidence on which they were intended to bear, and accordingly has not stated the evidence. Whether the instructions were improperly given, we can not decide, and are bound to presume that the court below did right in every instance, under the state of evidence before it

A new trial was moved for, relying on the grounds that the verdict was contrary to the law and evidence, and also, on the ground of surprise, verified by the affidavit of the appellant, and also another individual. The surprise consists in a witness of the appellee deposing different from what the appellant knew to be true, and from the way in which he knew that the witness acquired a knowledge of the facts, and it was too late, after the trial had progressed thus far, to obtain witnesses to impeach this witness. In this exception, likewise, the evidence is not detailed.

It may well be doubted, whether under any circumstances of this nature, this court ought to interpose and grant a new trial, which had been refused by the court below, unless the whole history of the trial was brought before this court, although the affidavits in support of the surprise, might appear on their face, fully adequate to support the application.

We are aware that such affidavits may be repelled by other evidence; and although they may, in themselves, seem to prove it, yet when applied to and compared with the evidence which had been given on the trial, there would appear to be no surprise. For instance, this witness, who had occasioned the supposed surprise, might have been so flatly contradicted during the trial, by other evidence, as to have destroyed his testimony, or the facts might have been conclusively proved by other evidence, or his testimony might have been so irrelevant, that impeaching of him could have made no difference, and, therefore, the court below may, very properly, have disregarded the affidavits tending to prove surprise, and we ought to suppose that it did so, and ought not to overturn the verdict on this account, unless the whole circumstances were before us, in as complete a manner as could be exhibited on paper.

For these reasons, we deem it improper to express any opinion on these last points; but for the first, the judgment must be reversed, the verdict be set aside, with costs, and the cause be remanded for new proceedings, not inconsistent with this opinion.

IMPEACHMENT OF WITNESSES—WHEN AND HOW A PARTY MAY IMPEACH HIS OWN WITNESS.—It is a general rule of the common law that a party who calls a witness is not allowed to discredit him afterwards by proof of his general bad character. "For that would be to enable him to destroy the witness if he spoke against him, and make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him:" Buller's N. P. 297. "By calling a witness a party represents him to the court as worthy of credit, or at least not so infamous as to be wholly

unworthy of it:" Best's Ev., sec. 645; Wharton on Ev., sec. 549. "If a party puts upon the stand a witness who is for any reason assailable, that party asserts or admits the credibility of that witness:" *Pollock v. Pollock*, 71 N. Y. 137; *Varick v. Jackson*, 2 Wend. 166; *Thompson v. Blanchard*, 4 N. Y. 303. "Whatever differences of opinion have existed elsewhere, I understand the rule in this state to be settled that a party may not impeach, either by general evidence, or by proof of contradictory statements out of court, a witness whom he has presented to the court as worthy of credit. He may contradict him as to a fact material in the cause, although the effect of that proof may be to discredit him; but he cannot adduce such a contradiction when it is only material as it bears upon his credibility:" *Coulter v. American Merchants' Union Ex. Co.*, 56 N. Y. 585; *Commonwealth v. Starkweather*, 10 Cush. 59; *Adams v. Wheeler*, 97 Mass. 67; *Lawrence v. Barker*, 5 Wend. 305; *People v. Safford*, 5 Denio, 112; *Quinn v. The State*, 14 Ind. 589; *Chamberlain v. Sands*, 27 Ma. 458; *Commonwealth v. Walsh*, 4 Gray, 535; *Brewer v. Porch*, 17 N. J. L. 377; *Stearns v. The Merchants' Bank*, 53 Pa. St. 490; *Rockwood v. Poundstone*, 38 Ill. 199; *People v. Jacobs*, 49 Cal. 384; *Craig v. Grant*, 6 Mich. 447; *Roundtree v. Tibbs*, 4 Hayw. 108; *McDaniel v. The State*, 53 Ga. 253; *Griffin v. Wall*, 32 Ala. 149; *Fairly v. Fairly*, 38 Miss. 280; *Young v. Wood*, 11 B. Mon. 123; 1 Greenl. on Ev., sec. 442.

But, although a party may not impeach his own witness directly, he may show collaterally that the statements made by him are not in fact true, and thus incidentally discredit him. "A party calling a witness is not precluded from proving the truth of any particular fact by any other competent evidence, in direct contradiction to what such witness may have testified; and this not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief. This is one of the exceptions to the general rule that a party cannot impeach his own witness:" *Norwood v. Kenfield*, 30 Cal. 394; *Fairly v. Fairly*, 38 Miss. 280; *Jackson v. Leek*, 12 Wend. 105.

"In this country, while a party cannot ordinarily discredit his own witnesses, his right to prove a case inconsistent with that stated by such witness is unquestioned, even though this discredit the witness incidentally:" Wharton on Ev., sec. 549; *Stockton v. Demuth*, 7 Watts. 39; *Wolfe v. Haver*, 1 Gill, 84; *Thom v. Moore*, 21 Iowa, 285; *Smith v. Ehanert*, 43 Wis. 181; *Warren v. Gabriel*, 51 Ala. 235; *Brown v. Wood*, 19 Mo. 475; *Brown v. Bellows*, 4 Pick. 179; *McArthur v. Sears*, 21 Wend. 190. "If his witness testifies in respect to a particular fact, contrary to what he believes to be true, he may prove the fact to be otherwise by other competent testimony, however much the particular contradiction may tend to discredit the witness generally:" *Olmstead v. Winsted Bank*, 32 Conn. 278. "There is nothing in any known rule of evidence to prevent a party from contradicting his own witnesses, and it would be a very dangerous thing to introduce such a rule. Every one would then be at the mercy of his own witnesses, and if the first witness sworn should swear against him he would lose the testimony of all the rest. This would be a perversion of justice:" *Snell v. Gregory*, 37 Mich. 500.

But whether or not, under the common law, it was competent for a party to show that his own witness had made statements out of court inconsistent with the evidence which he had given in it is a point unsettled, with the weight of authority, however, both in this country and in England, in the negative: Best on Ev., Morgan's ed., par. 645; *Coulter v. American Mer-*

chants' Union Ex. Co., 56 N. Y. 585. "He certainly cannot be allowed to prove by other witnesses inconsistent statements previously made by the witness in question, which would not be admissible as independent evidence, and which, therefore, can have no effect but to impair the credit of the witness with the jury:" *Adams v. Wheeler*, 97 Mass. 67; *Smith v. Price*, 8 Watts. 447; *Regina v. Ball*, 8 Carr. & Payne, 745.

But it has been held, even at common law, that an adverse witness who tells a story contradicting what he had previously stated, may, on the party calling him being thus surprised, be examined as to such previous statements. In the *State v. Benner*, 64 Me. 267, Appleton, C. J., says: "It is a rule of the common law, that the testimony of a witness may be contradicted by different and varying statements, made at other and different times, either under oath or not:" *State v. Lull*, 37 Me. 246; *Commonwealth v. Mead*, 12 Gray, 167. In the latter case the court say: "The only other question arising in the case is, whether the testimony of grand jurors is admissible to prove that one of the witnesses in behalf of the prosecution testified differently on his examination before them from the testimony given by him before the jury of trials. As to the competency of such evidence the authorities are not uniform. The weight of them is in favor of its admissibility. On principle it seems to us to be competent." And Tilghman, C. J., says in the case of *Cowden v. Reynolds*, 12 Serg. & R. 281: "And hard indeed would be the case of one who calls a witness, expecting that he would swear the truth, if, upon finding himself deceived, he may not show that the witness had told a different story at another time:" *Bank of Northern Liberties v. Davis*, 6 Watts. & S. 285; *Champ v. Commonwealth*, 2 Met. (Ky.) 24; *Hemingway v. Garth*, 51 Ala. 580; *Campbell v. The State*, 23 Id. 44; *Rez v. Oldroyd*, Rus. & Ry. 88; *Melhiush v. Collier*, 15 Q. B. 578. In this last case Erle, J., says: "The point is one upon which judges have differed, and opinions may vary to the end of time." In the case of *The People v. Jacobs*, 49 Cal. 384, Wallace C. J., says: "There is, undoubtedly, some confusion in the adjudged cases upon this and kindred questions concerning the limit to which a party may go in contradicting the evidence of his own witness, who unexpectedly testifies against him. The rule most consonant to reason, I think, is that given in Greenleaf, vol. 1, sec. 444 a; Redfield's ed. * * * 'You may cross-examine your own witness if he testify contrary to what you had a right to expect, as to what he had stated in regard to the matter on former occasions, either in court or otherwise, and thus refresh the memory of the witness, and give him full opportunity to set the matter right if he will; and, at all events, to set yourself right before the jury. But you cannot do this for the mere purpose of discrediting the witness; nor can you be allowed to prove the contradictory statements of the witness upon other occasions, but must be restricted to proving the facts otherwise by other evidence.'"

While the common law on this point was in this unsettled condition, the law in England was settled by the passage of the act 17 and 18, Vict. c. 125, sec. 22, which enacts that, "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstance of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." This statute, which has since been extended to all courts in England

and Ireland, was borrowed in great part from the New York Code of Civil Procedure, secs. 1845 and 1848. These sections have been incorporated, verbatim, into the California Code of Civil Procedure, secs. 2049 and 2052. In Massachusetts, the English statute has been adopted almost verbatim, leaving out, however, the words, "in case the witness shall, in the opinion of the judge, prove adverse," and "by leave of the judge." See *Ryerson v. Abington*, 102 Mass. 526. Provisions substantially the same as those of the New York Code and the English statute, above referred to, have been enacted in several of the states, as in Kentucky, Georgia and Indiana. In Massachusetts, since the passage of the act above referred to, Stats. of 1869, c. 425, it is held to be unnecessary that a party should be surprised to entitle him to impeach his own witness, by showing that he made, at other times, statements contradictory and inconsistent: *Brooks v. Weeks*, 121 Mass. 433.

WHEN AND HOW A PARTY MAY IMPEACH A WITNESS OF THE ADVERSE PARTY.—A witness called by the opposing party may, after his examination in chief, be impeached: 1. By disproving by other witnesses such of the facts stated by him as are material to the issue: 1 *Greenleaf on Ev.*, sec. 461; 2 *Taylor on Ev.*, sec. 1292. But if a statement of a fact collateral to the issue be drawn from a witness upon cross-examination, the party eliciting the testimony cannot contradict it: *Bell v. Woodman*, 60 Me. 465; *State v. Benner*, 64 Id. 287; *Carpenter v. Ward*, 30 N. Y. 243; *Baker v. Baker*, 3 Swab. & Trist. 213. "But the statement which it is intended to contradict must involve facts in evidence. If confined to opinion, when opinion is not at issue, or to other irrelevant matter, the cross-examining party is bound by the answer." *Wharton on Ev.*, sec. 551; *McNeill v. Arnold*, 22 Ark. 477; *McKern v. Calvert*, 59 Mo. 244; *State v. Reid*, 60 Me. 550; *Brackett v. Weeks*, 43 Id. 291; *Sumner v. Crawford*, 45 N. H. 416; *Commonwealth v. Mooney*, 110 Mass. 99; *Holmes v. Anderson*, 18 Barb. 520; *Dunn v. Dunn*, 11 Mich. 285; *Elton v. Larkins*, 5 Carr. & Payne, 385.

2. By proving that on a former occasion he made a statement inconsistent with a statement material to the issue made by him on the trial. "The question presented must be settled by the application of certain rules of evidence, which are well settled. A party has the right, for the purpose of discrediting the testimony of an adverse witness, to prove statements made by him contradicting the testimony given, after the requisite examination of the witness, in regard to such statement." *Schell v. Plumb*, 55 N. Y. 592; *State v. Kingsbury*, 58 Me. 238; *State v. McDonald*, 65 Id. 466; *Gerrish v. Pike*, 36 N. H. 510; *Law v. Fairfield*, 46 Vt. 425; *Hook v. George*, 108 Mass. 324; *Commonwealth v. Bean*, 111 Id. 438; *Beardsley v. Wildman*, 41 Conn. 515; *Stable v. Spohn*, 8 Serg. & R. 317; *Schlater v. Winpenny*, 75 Pa. St. 321; *Pittsburg etc. R. R. Co. v. Andrews*, 39 Md. 329; *Mimms v. The State*, 16 Ohio St. 221; *Forde v. Commonwealth*, 16 Gratt. 547; *Stewart v. People*, 23 Mich. 63; *Craig v. Rohrer*, 63 Ill. 325; *Harris v. The State*, 3 Ind. 131; *State v. Johnson*, 12 Minn. 476; *Keerans v. Brown*, 68 N. C. 43; *Powers v. The State*, 44 Ga. 209; *Moore v. Jones*, 13 Ala. 296; *Peck v. Ritchie*, 66 Mo. 114.

In order to discredit a witness in this way, it is generally necessary to first ask him on cross-examination, whether or not he has made such prior contradictory statement, specifying the person to whom such alleged statement was made, and as far as possible, the time and place: *Wharton on Ev.*, sec. 555. "It is, indeed, an established rule of practice in this state that testimony of this kind cannot be received to impeach a witness produced upon the stand, unless an opportunity be first afforded to the witness, whose tes-

timony it is proposed to impeach, to explain or qualify the imputed declarations:" *Downer v. Dana*, 19 Vt. 338. "The credibility of a witness can be impeached by proof of contradictory statements, only after laying a proper foundation by asking the witness in reference to the time and place thereof:" *Williamson v. Peel*, 29 Iowa, 458; *People v. Devine*, 44 Cal. 452; *Floyd v. Wallace*, 31 Ga. 688; *Hill v. Gust*, 55 Ind. 45; *Richardson v. Kelly*, 85 Ill. 491; *Runyan v. Price*, 16 Ohio St. 1; *Higgins v. Carlton*, 28 Md. 115; *State v. Wright*, 75 N. C. 439.

3. By offering evidence attacking his character for truth and veracity: *Ordway v. Haynes*, 50 N. H. 159; *Hamilton v. The People*, 29 Mich. 173. But the evidence must be confined to his general reputation, and it cannot be permitted as to particular facts: *Shaw v. Emery*, 42 Me. 59; *Root v. Hamilton*, 105 Mass. 22; *Uhl v. Commonwealth*, 6 Gratt. 706; *Foster v. Newbrough*, 58 N. Y. 481; *Long v. Morrison*, 14 Ind. 595; *Ruddill v. Slingerland*, 18 Minn. 380; *Newman v. Mackin*, 21 Miss. 383; *Spears v. Forrest*, 15 Vt. 435; *Taylor v. Commonwealth*, 3 Bush. 508; *Thurman v. Virgin*, 18 B. Mon. 792. It must be confined to character for truth, and cannot be introduced to show general badness, as want of chastity, and the like: *People v. Yelas*, 27 Cal. 630; *State v. Morse*, 67 Me. 423; *Kilburn v. Mullen*, 22 Iowa, 498. This seems to be the generally received opinion, and the one sustained by the greater weight of authority. But in *Hume v. Scott*, 3 A. K. Marsh. 260, it was held proper to ask what was the general moral character of the witness. See, also, *Gilliam v. The State*, 1 Head, 38; *State v. Breeden*, 58 Mo. 507. The impeaching witness must first be questioned as to the impeached witness's character or reputation for truth and veracity, in the neighborhood in which he has lived: *Boyle v. Kreitzer*, 46 Pa. St. 465; *French v. Millard*, 2 Ohio St. 44; *Crabtree v. Hagenbaugh*, 25 Ill. 233; *State v. Randolph*, 24 Conn. 363; *Keator v. The People*, 32 Mich. 484; *Smithwick v. Evans*, 24 Ga. 461. The impeaching witness may then be asked if he would believe the impeached witness on his oath: *Boyle v. Kreitzer*, 46 Pa. St. 465; *Hillis v. Wylie*, 26 Ohio St. 574; *Keator v. The People*, 32 Mich. 484; *Hamilton v. The People*, 29 Id. 173; *People v. Mather*, 4 Wend. 229; *Eason v. Chapman*, 21 Ill. 33.

4. By showing his bias, by proving near relationship, sympathy, hostility or prejudice, so far as shown by declarations and acts: *Carr v. Moore*, 41 N. H. 131; *Drew v. Wood*, 26 Id. 363; *Swett v. Shumway*, 102 Mass. 365; *Batdorff v. Farmers' Nat. Bank of Reading*, 61 Pa. St. 183; *Bersch v. The State*, 13 Ind. 434; *Conkey v. Post*, 7 Wis. 131; *Bishop v. The State*, 9 Ga. 121; *Head v. The State*, 44 Miss. 731; *Tardif v. Baudoin*, 9 La. An. 127; *Cornelius v. The State*, 12 Ark. 782; *Chelton v. The State*, 45 Md. 564.

HUTCHCRAFT v. SHROUT'S HEIRS.

[1 T. B. MCNROE, 206.]

JOINDER OF PARTIES.—A guardian and the sureties on his bond may be joined as defendants in an action by the ward for an accounting, and two or more wards may join as plaintiffs in such an action.

GUARDIAN'S BONDS.—Where two bonds were given by the same guardian, at different times, all the sureties on both bonds were held liable for the whole amount.

NON-JOINDER OF PARTIES.—In a suit by a ward against his guardian and securities, all the sureties who are living, and the representatives of those who are dead, must be made parties.

BILL in chancery. Error to the Bourbon circuit. The opinion states the case.

Bibb, for the plaintiffs.

Wickliffe, for the defendants.

By Court, **MILLS, J.** William Mitchell, in 1805, was appointed guardian of Rachel and Eleanor ShROUT, then infants, and entered into and acknowledged his bond, to secure to said wards, and indemnify the court, according to law, with George Wilson and James Mitchell as his sureties. In 1813, the sureties having applied to court for some redress against their principal, a new bond was executed by said Mitchell, with Thomas Hutchcraft, his surety, in all respects like the first, conditioned to account for the estate which then was or might become due from him to said wards. In 1819, Rachel ShROUT filed her bill against said William Mitchell and his sureties, George Wilson and James Mitchell, in the first bond, praying an account of her share of the estate, and a decree therefor. William Mitchell answered, admitting a sum in his hands. By an amended bill, she suggests her marriage, and states that the sureties, George Wilson and James Mitchell, had both departed this life, and makes the executor of George Wilson, party, and says nothing as to the representatives of James Mitchell. The executor answered, and alleges that his testator was released as surety by the last bond with Thomas Hutchcraft, as surety, as before stated. In another amended bill, Eleanor ShROUT, the remaining ward, and her husband came in as co-complainants, and Hutchcraft is made defendant; and this bill alleges that Hutchcraft became counter security for said George Wilson and James Mitchell, the first securities. None of the rest of the parties, except George Wilson's executor, answered. On a final hearing, the court decided that the bond given by Hutchcraft was a supplemental and conditional bond only, and decreed the amount in the hands of the guardian, to be paid by him and the executor of George Wilson and Hutchcraft jointly; and to reverse this decree, the writ of error is prosecuted.

1. It is insisted that this bill will not lie against the securities, but only an action at law can be maintained against them. We think otherwise. Equity has always entertained jurisdiction between guardian and ward, and will compel the former to

account with the latter for the estate in his hands. If that sum is secured by bond and surety, we have no doubt that the jurisdiction, as to the guardian, will draw with it the surety. It is more beneficial to the surety that it should be so. He then has the opportunity of seeing that the account is correctly settled. If he was no party to the suit at chancery, and can only be sued at law after the account is settled, one of two inconveniences must follow; either he must be bound by the decree, to which he is not a party, and when the account might be settled erroneously, when sued at law; or, not having been party to the decree, he could not be bound at all, and could unravel the account in the action at law, and compel the ward to re-travel over the whole settlement. It is, therefore, better that he should be made a party at once, when he can see to his interest, and when the chancellor thus has possession of the matter, to avoid circuitry of action, or multiplicity of suits, he will decree the amount to be paid at once.

2. It is insisted that these complainants cannot join in the suit, but must bring their several suits. If it be conceded that the action at law upon such bond must be several, it does not thence follow that such wards could not join in a suit in equity to demand a settlement and payment from their guardian, who has undertaken for both at the same time and by the same instrument. It is true, that when estates are distributed from the hands of the personal representative to the distributee, or his guardian, in case of his minority, it may be supposed that distribution has taken place; that the guardian has received for each his separate share, and, of course, may be liable to each in a separate proceeding. This, however, is not always the case, and the payment, in case of joint distributees, may be made to their joint guardian, in one entire and undivided sum; and although neither the bill nor answer is explicit on this point, yet there is no allegation of any previous division or distribution of the fund before its payment to the guardian; and as both the wards were children of the same decedent, and entitled to the same estate, the presumption is strong that the guardian received it undivided, and that the division is still to be made. We need not, therefore, inquire whether they could join if the estate had been previously divided, as we conceive that they certainly can join when the estate never was divided, and that this exception cannot prevail.

3. There seems to be a contest between these sureties about their liability. The executor of Wilson, one of the sureties in

the first bond, contends that the last bond is an exoneration of the sureties in the first, while the last surety would seem to insist upon the first bearing all. With the court below, we do not deem the last bond to be given as counter security; for then it would have bound the last surety to indemnify the first, and it is only an additional bond for the whole amount and not to make good the defalcations which might fall on the first; so that neither bond is a discharge of the other, and all the sureties must remain liable to the whole amount for which their principal is bound.

4. It is, however, contended that the representatives of James Mitchell, one of the sureties in the first bond, ought to have been brought before the court, and that the complainants, while pursuing sureties, were not at liberty to select such as suited them, and omit the rest. This exception to the proceeding is well taken. If Wilson's representatives are liable in case of a failure of their principal, they would be entitled to contribution against the representatives of James Mitchell; and if so, the latter ought to be parties; for otherwise they would not be bound by the decree in this cause, and the representatives of Wilson would, in a proceeding to enforce such contribution, be bound to prove their demand anew, as a matter not adjudicated, and thus the benefit of the decree in this cause would be lost to them.

5. The same may be said with regard to Hutchcraft; for although he is bound in a separate bond, and is not united with the other sureties, and might not be supposed to have trusted to them to make good any part of his liability, yet he is bound for the same person and for the same thing; and although there may appear to be no privity in law between him and the others, yet equity, which delights in equality, will generally in such cases equalize the burden to the extent of their identity of obligation; and here the undertaking of each appears to be precisely the same. The representatives of Mitchell ought, therefore, to have been made parties.

The decree must, therefore, be reversed, with costs, and the cause be remanded, with directions to the court below to dismiss the bill without prejudice to any future suit for the same cause, unless the complainants shall amend their bill, and bring the representatives of James Mitchell before the court, in a reasonable time given for that purpose, or shall show good reasons why it cannot be done.

HUGHES v. ROBERTSON.

[1 T. B. MORROW, 215.]

EXCEPTIONS must be taken at the trial, but they may be written out and sealed afterwards, and, though the bill of exceptions is enrolled and filed after the trial, it will be presumed that the exception was taken at the proper time.

VENDOR IS LIABLE FOR SELLING A BLIND HORSE at a sound price, without declaring his blindness, if it was such as not to be discovered at first view.

CASE. Error to the Estill circuit. The opinion states the case.

Hanson, for the plaintiff.

Turner, for the defendant.

By Court, MILLS, J. The plaintiff in the court below, and now plaintiff in error, declared against the defendant in three counts, for fraud in the sale or exchange of horses. The first count was for knowing a defect in the eyes of the beast he disposed of, and fraudulently concealing it; the second, for falsely representing his beast to be sound, knowing the fact to be otherwise; and the third, for inducing the plaintiff to purchase, by fraudulently warranting the beast to be sound.

On the trial of the issue of not guilty, the plaintiff gave no evidence conducing to prove the two last counts; but proved that the beast was blind or nearly so, and had been so for some years, and had been previously sold as blind; that nobody could keep the animal long without discovering its blindness, although it might not be discovered on the first view; that the defendant well knew the fact, but, at the time of the exchange, made no statement about it, and appeared to give up the beast to be examined by the plaintiff at pleasure, and said to a witness, who observed that the mare was blind, not in the plaintiff's presence, while the parties were on treaty, "never mind that." The price given for the beast was as great as it would have commanded if sound, and much beyond its value in its present state.

The court, on this evidence, instructed the jury as in case of a nonsuit, and the plaintiff excepted, and has brought the case to this court by writ of error.

1. A previous question is made before we reach the merits. It is insisted that, as the record shows that the bill of exceptions was filed some days after the trial, and not during it, it cannot

be noticed by this court. That exceptions ought to be taken on the trial, as the decision takes place, we have no doubt; but that it is necessary that it should be written and sealed at that moment to make it valid, is what we cannot admit. That it can be done at any convenient time, and postponing it for the moment may be a great convenience, not only to the court and counsel, but also to the jurors, who are the triers to the controversy.

2. If notice was not given at the time of the decision, that an exception would be taken, and, notwithstanding, the exception should be presented at a future day, and the court should, for that cause, refuse to seal it, it would be a different question from the one we are considering.

3. But, when the exception is afterwards sealed and allowed, and appears of record, without any further statement, we are bound to believe that the exception was taken at a proper moment, and the filing and enrolling of it postponed until then, to suit the convenience of all concerned, and, when so done, it must be as valid as if entered between the swearing and verdict of the jury.

4. With regard to the propriety of the instruction given, it is insisted that the evidence conduced to prove the concealment of a known defect, and that for such concealment an action will lie. On the other hand, it is contended, that a court of equity will set aside a contract for suppression of truth; but there is no precedent for such a declaration in a court of law, and no adjudicated case which warrants an action for a bare concealment, and that the law only gives remedy where there has been a misrepresentation.

It is true that the books of forms do not furnish a precedent expressly in point; but they do exhibit precedents of declarations for deceit in sales, which, in principle, come up to the present case. And it is not necessary that the seller should have been active in producing the concealed defect in the article sold, to make the deceit actionable. If it is placed there by other causes, and concealed, the seller is guilty of deceit, and ought to be responsible.

But, if the adjudged cases and books of forms were wholly silent on this subject, elementary writers all acknowledge the impropriety of concealment, and the *suppressio veri* makes no inconsiderable figure on their pages. If the chancellor would vacate a contract for it, no good reason can be given, why a court of law should not give an action on account of it, and re-

munerate the party in damages. Indeed, we would rather suppose that the law first admitted the right and was followed by equity; for courts of law are as much bound to notice fraud as courts of equity, and to redress it, where it can give complete redress; and no reason is perceived, why a court of law cannot give as complete redress for concealment as misrepresentation, especially where the party, as in this case, so soon as he discovers the defect, disaffirms the contract, and tenders back the article.

The principles of sound morality and reason concur in tolerating such an action at law. It was the duty of the seller in this case, to divulge the defect, which was not apparent. He, on the contrary, held his peace seeming, at the same time, to surrender the beast for examination. He saw that the purchaser did not discover the defect, and proceeded to pay a fair price for the beast, as if there was no defect, and he took it, sensible that he was obtaining, by his concealment, more than good conscience allowed him to receive. In all such cases, it will better comport with morality and sound policy, to subject the seller to an action at law, and thereby impose upon him the legal as well as moral duty of telling the whole truth, especially where the defect, as in this case, is a latent one, which might take some time and nicety of observation to discover. We, therefore, conceive that the court below erred in giving the instruction as in case of a nonsuit.

The judgment must, therefore, be reversed, with costs, and the verdict set aside, and the cause be remanded for new proceedings not inconsistent with this opinion.

FRAUDULENT CONCEALMENT IN SALES.—In the often cited case of *Poddock v. Strobridge*, 29 Vt. 470, Chief Justice Redfield gave the question of fraudulent concealment in sales an attentive and able consideration. The point submitted, as stated by the justice, was, whether in the sale of a horse having an internal and secret malady of a fatal character, and no external indications calculated to excite suspicion of its existence, but known to the seller, and not to the purchaser, and which the seller knows or believes the purchaser would not buy, if he did know of its existence, and still sells at such a price as the article seems to be worth, without disclosing the defect, he is guilty of such fraud and deceit as will be actionable.

After referring to the odium attaching to positive misrepresentations, Judge Redfield says: "And there is a degree of negative deceit which the more recent cases certainly do not justify. And the vendor must know at the time that the vendee is misled, and must intend he shall be, and must do this for the purpose of gaining an unjust advantage, which he could not otherwise expect to do. This negative deceit has more commonly been reached in the English courts by engrafting successive exceptions to the gen-

eral rule of warranty by way of implied warranties. As in regard to provisions bought for consumption that they are wholesome. * * * And following out this, as the leading idea, it seems now to be the settled rule of law in Westminster Hall, that there is an implied warranty on the part of the seller that the article sold is what it appears to be, so far as the vendor knows. In other words, that a defect in the article, which changes its essential character, and renders it wholly unfit for the purpose for which it is purchased, will justify the vendee in rescinding the sale, or bringing suit for damages at his election. It seems to be there considered that secret defects in the article sold which materially affect its value, and which the vendor supposes the vendee would regard as an impassable barrier to the contract must be disclosed, or the contract is not binding. To have this effect, the defect must be known to the vendor, and wholly unknown to the vendee, and there must be no external or sensible indication calculated to excite suspicion in ordinary observers. It must be of such a character as clearly to have formed an impassable barrier to the contract, and so understood by the vendor at the time. In such case the defect being known to one party and unknown to the other, is not what the law strictly understands by latent defects. And it is impossible to make any sensible distinction between such a case and one where a party uses some device to mislead the other party in regard to a defect which he might otherwise have discovered, or where he makes positive representations of soundness, knowing them to be false, which is done ordinarily to put the other party off his guard. * *

"We should not probably be prepared to say that a sound price, of itself, implies a warranty in all cases against secret defects known to the vendor and not known to the vendee. But we think even the latitude of the English common law, which upon this subject is proverbially lax, does not justify the vendor in palming off upon the vendee a valueless article which is apparently valuable, for a price corresponding to its appearance, under the delusion in the mind of the vendee that the thing is really what it appears to be, but which the vendor at the time knows to be a mere delusion. This amounts to nothing more than an implied warranty against selling a shadow for substance, an image for the reality. And in every such case the very sale is equivalent to a representation that the thing is, as far the vendor knows, what it appears to be, and does impose upon the vendor the duty of correcting any such delusion into which he has led the vendee by offering to sell him, for a valuable price, what he knows or believes to be, and which is really valueless, or of essentially different and less value than it appears to be and is taken to be by the vendee, and without which belief he would not have made the purchase, and this well known to the vendor." As flowing from an examination of the authorities and principles bearing upon the matter, it is stated: "That there is no positive duty on the vendor to disclose secret defects in the article, but if he conceal them even by silence, when he knows the other party has fallen into a delusion in regard to them, and is making a purchase which he otherwise would not make, or at a price materially beyond what he otherwise would, in consequence of such delusion, this is equivalent to a false representation or the use of art to disguise the defects of the article."

Other decisions pronouncing fraudulent the concealment by the vendor of defects in the article sold, which were not apparent on inspection, which materially affected the article, and by reason of which the vendee was deceived to the knowledge of the vendor, are: *Maynard v. Maynard*, 49 Vt. 297; *Graham v. Stiles*, 38 Id. 578; *French v. Vining*, 102 Mass. 135; *Hanson v. Edgerly*,

29 N. H. 343; *Brown v. Montgomery*, 20 N. Y. 287; see, also, 1 Story's Eq. Juris. 212 a, 12 ed., and Benj. on Sales, 430 and notes.

The facts presented by the case of *Maynard v. Maynard*, 49 Vt. 297, were: The plaintiff, in purchasing a bull of the defendant, informed him that he wanted the bull to put with his cows, but did not ask him whether or not the bull was suitable for that purpose. The bull, though sound in appearance, was, to the knowledge of the defendant, without the power of propagation. Defendant did not disclose his knowledge of the defect, but otherwise used no means to conceal it, or in any way to mislead or deceive the plaintiff. In an action of deceit for damages occasioned to the plaintiff's dairy by reason of his cows not having calved, the defendant was held liable. The court, per Rose, J., considered the non-disclosure of the bull's unsoundness a fraudulent concealment of a material fact peculiarly within his own knowledge, and which he was called upon to disclose. Several decisions are referred to and the conclusion reached that the defendant's act of selling "under the circumstances, and affected with the knowledge he had of the inducement and purpose, was equivalent to an affirmative representation that the property was suited for that purpose, and rendered him an active participant in giving effect to the delusion or belief which caused the injury, and hence was guilty of deceit."

A distinction is taken in regard to extrinsic circumstances within the knowledge of one of the parties, and which affect the value of the thing sold. These circumstances, the party, having knowledge thereof, is not bound to disclose. The question arose in *Laidlaw v. Organ*, 2 Wheat. 178, where the vendee of a lot of tobacco did not communicate to the vendor the news of peace with England, a fact which greatly enhanced the value of the commodity. Chief Justice Marshall said, on behalf of the court, that the vendee "was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties." This opinion was qualified by the warning instruction: "But at the same time each party must care not to say or do anything tending to impose upon the other." See, also, *Kiatzing v. McElrath*, 5 Pa. St. 467. In order to enable the purchaser of a chattel to recover damages from the seller, in an action of deceit, on the ground of a suppression of the fact of existing defects, it has been determined that there must be an intent to deceive on the part of the seller. The law is so stated in *Hanson v. Egerly*, 29 N. H. 343. "The case of a mere omission to state material facts to a purchaser which are unknown to him may be unattended with fraud. It might be accidental. But if the facts are known to the vendor, and there is an intentional concealment or suppression of them in making a contract, such concealment must be understood as intended for no other purpose than to deceive and mislead the vendee; and where in such case the vendee has not equal means of information, he must be regarded as deceived and defrauded." Other adjudications to the same effect are: *Howard v. Gould*, 28 Vt. 523; *Laidlaw v. Organ*, 2 Wheat. 178; *Paddock v. Strobeidge*, 29 Vt. 470.

ALLEN v. CAMP.

[T. B. MORRIS, 231.]

CREDITOR'S BILL, to vacate fraudulent conveyances, can not be sustained unless complainant is a creditor by a judgment.

BILL in chancery. Error to the Jefferson circuit. The opinion states the case.

Bibb, for the plaintiffs.

Denny, for the defendants.

By Court, BOYLE, C. J. Allen, Ward, and Prather leased to Camp a tavern, in Louisville, for the term of five years, commencing the ninth of January, 1819, at a rent of three thousand dollars per annum, payable quarterly. When the two first quarters' rent became due, the lessors distrained, and Camp sued out a writ of replevin, and had the goods restored to him, Gray becoming his security to obtain the replevin.

On the nineteenth of August, 1819, Camp executed two deeds of conveyance to Gray, the one for a tract of land of three hundred and ninety and three fourth acres, and the other for his slaves, and all his personal estate, including his household and kitchen furniture. To set aside these deeds as fraudulent, the lessors filed this bill, praying that the property might be made subject to be sold for the payment of the rent due, and to become due, and that Gray might be enjoined from selling or removing the same. By an amended bill, filed the twenty-fourth of May, 1820, the complainants charge that the rent, which had accrued since the filing the original bill, was in arrear and unpaid.

Gray and Camp answered, and each of them denies the deeds to be fraudulent, and insists that they were made in consideration of money due from Camp to Gray, and for debts which Camp owed to others, and to pay which, Gray was bound, and had assumed upon himself their payment. The circuit court decreed that the deed, including the slaves and personal estate, should be annulled; but did not set aside the deed for the tract of land, and the complainants have appealed to this court.

1. We can perceive no just ground the complainants have to complain of the decree. They have not shown themselves to be creditors by judgment and execution, and, without having done so, they could not be in an attitude to impeach the deed for the tract of land, on the score of its being fraudulent. We will not

say that they might not be entitled to the aid of a court of equity, in setting aside the other deed, so far as it opposed an obstruction to their right to distrain for the rent in arrear; but the decree of the circuit court has at least gone far enough, for that purpose; for their right to make distress, only extended to the personal estate on the demised premises; and the decree has, therefore, given them relief to the full extent of their right.

The decree must be affirmed with costs.

BARRETT v. LIGHTFOOT.

[1 T. B. MONROE, 241.]

AN ABUSE OF LEGAL AUTHORITY makes the guilty person liable as a trespasser *ab initio*.

ESTRAYS.—The using of an estray by the taker up, except in a matter of necessity and for the benefit of the owner, is wrongful, and renders him liable in trespass.

TRESPASS. Error to the Ohio circuit. The opinion states the case.

Haggin, for the plaintiffs.

Ortenden, for the defendant.

By Court, OWSLEY, J. This writ of error, with supersedeas, is prosecuted by Barratt and Gentry to reverse a judgment recovered against them in an action of trespass, which was brought in the court below by Lightfoot, for the taking, and, by immoderate and illegal riding, killing a horse.

Two pleas were pleaded in that court: 1. Barrett and Gentry pleaded jointly the general issue; 2. Barrett pleaded that the plaintiff his action ought not to have and maintain, because he says that previous to the supposed trespass in the declaration mentioned, the said horse was estrayed from the home and possession of the said Lightfoot, and had come lost and estrayed to the plantation and place of residence of the said Barrett, and broke into his farm, viz., at the circuit aforesaid, and the said Barrett had taken up the said horse as an estray, as by the law of the land he well might; and previous to the ten days allowed by law to post said horse as an estray, his wife was taken very ill and in danger of death, and the said Barrett not having any other means by which he could send for a physician to attend his said wife, did then and there, as well he might, and out of necessity, request the said Gentry to ride

the said horse moderately to the town of Hartford, at the circuit aforesaid, for a physician; and the said Barrett avers, that the physician to whom he requested the said Gentry to go was the nearest physician to the residence of the said Barrett, and that the request so made to the said Gentry was of necessity and out of humanity and duty to his wife; and this is the same trespass in the declaration supposed, without this, that he is guilty, etc., etc.

To this plea Lightfoot demurred, and the demurrer was sustained by the court. Whether or not, in sustaining the demurrer, the court decided correctly, is the first question made by the assignment of errors. In argument, the correctness of the decision was combated upon two grounds:

1. It was contended, that assuming the allegations of the plea to be true, there was nothing illegal in Barrett's treatment of the horse, and that no action can be sustained against him by Lightfoot for the loss of the horse. But if any action can be sustained, it was contended: 2. That Lightfoot misconceived his remedy, by bringing an action of trespass. If, however, the use which Barrett is alleged by the plea to have made of the horse be admitted to be illegal, it is perfectly clear that in bringing trespass, Lightfoot adopted the legitimate and appropriate action; for, in taking up the horse, which the plea alleges to have estrayed, Barrett must be understood to have acted under the authority of the law; and if so, the doctrine is well settled, that any subsequent abuse of that authority makes him a trespasser *ab initio*, and as such liable to be sued for the injury produced by the abuse in an action of trespass: Cro. Ja. 148.

2. Was it, then, illegal, under the circumstances alleged in the plea for Barrett, while he held the horse as an estray, and before the horse was posted, to employ him in sending for a physician? This question must, we apprehend, be answered in the affirmative. It was not, indeed, controverted in argument, but what the taker up of a stray, is not, in the general, at liberty, before the stray is posted, to use it; but it was contended that there are exceptions to this general rule, and we were referred to Buller's *Nisi Prius*, as an authority to prove that where there exists a necessity to do so, a stray may be used. The authority in Buller is taken from an adjudged case reported in Croke James, and will probably be better understood by adverting to the language which the court are reported to have employed in that case. In that case, when remarking upon the subject of using an estray, the court ob-

served: "It is not lawful for any to use it in any manner, unless in case of necessity, and for the benefit of the owner, as to milk milch kine; because otherwise they would be spoiled; and so of the like. But to use a stray horse by riding or drawing, is tortious, although it were alleged that the common course is to use stray horses with withes about their necks:" Cro. Ja. 148. It will at once be admitted that the case in Croke goes as well to establish the principle that strays cannot in the general, be used, as that there may exist such a necessity for using them as to form an exception to the general principle, and renders the use lawful. But to have that effect, the necessity must, we apprehend, be of a different sort to that which is alleged in the plea of Barrett. The illustration made by the court in the case cited shows the sense in which the expression, necessity, was intended by them, and proves conclusively that strays cannot be lawfully used by the taker up, unless to use them be necessary to preserve them from injury, and for the benefit of the rightful owner. There being, therefore, no necessity for using the horse by Barrett, alleged in his plea, the use was illegal, and an abuse of the authority of the law, and as such, the demurrer to the plea was correctly sustained.

3. In the progress of the trial in the court below, Barrett and Gentry objected to a question which was propounded to a witness by Lightfoot, and by the assignment of errors the decision of the court in overruling the objection is also controverted.

It is, however, proper to remark that from a bill of exceptions, which purports to contain all of the evidence introduced on the trial, it is apparent that, although the question was allowed to be put to the witness, either no answer was made, or if made, it was not allowed to go to the jury.

Were the question, therefore, admitted to be of a character that ought not to have been propounded to the witness, the mere circumstance of the court having overruled the objections taken to it, furnishes no sufficient cause for reversing the judgment.

The judgment must consequently be affirmed, with costs and damages.

THE BANK OF CARLISLE v. HOPKINS.

[1 T. B. MONROE, 245.]

BOND OF BANK CASHIER.—A cashier's bond conditioned "for the faithful discharge of the duties of his office," is broken by his violation of any valid by-law which the corporation may adopt.

A BANK having power to adopt by-laws, and to exact from its cashier a bond conditioned for the faithful discharge of the duties of his office, may enlarge the condition so as to embrace all the duties which it could by its by-laws exact, though such duties are not specified in the by-laws adopted.

ARREST OF JUDGMENT.—If, in an action on a bond, there be several breaches assigned, and some of such assignments are insufficient, and a general verdict be rendered, the judgment will be arrested.

DEBT. Appeal from the Nicholas circuit. The opinion states the case.

Bibb, for appellants.

By Court, OWSLEY, J. This suit was brought by the bank, in its corporate name, against its cashier, Moses Hopkins, and his sureties, upon his official bond. The declaration is in debt, upon the penalty, setting out the consideration and assigning breaches specifically. Upon a demurrer to the declaration, the court below rendered judgment against the bank.

1. We have been unable to perceive the principle upon which the court went in sustaining the demurrer, unless it was thought that the bond upon which the action is founded, possesses no legal validity, in consequence of the condition not being in strict conformity to the requisitions of the act incorporating the bank. The act requires of the cashier, before he enters upon the duties of his office, to give bond with two or more securities, to be approved of by the directors of the corporation, in a sum not less than thirty thousand dollars, conditioned for the faithful discharge of the duties of his office. The bond upon which the suit is founded, contains a condition "that said Hopkins should well and truly perform all the duties of his office, according to law, and the by-laws of the institution, during the term of his continuance in office; and that he should also carefully preserve all money, books, papers, etc., belonging to said bank; and not, at any time directly, or indirectly, make known, in any way, to any person, or persons, except the president and directors of said bank, any secrets, or other words, that may discover the situation, or state of the funds or credits of said bank." The condition of the bond

thus recited, will at once be perceived not to be in language precisely the same as that employed in the act requiring the cashier to give bond; but, though not in language the same, we apprehend the variance is not such as to invalidate the bond. It was incumbent upon Hopkins, according to the provisions of the act of incorporation, to execute a bond conditioned for the faithful discharge of the duties of his office. If such had been the precise expressions of the condition of the bond, which was executed, it could not be denied, but under the authority given in other parts of the act, to the directors, to adopt by-laws, that the performance of every stipulation, contained in the condition of the bond, might in the form of by-laws, have been required of the cashier; and, after the adoption of such by-laws, and failure to perform the duties imposed by them, an action might be sustained on the bond.

It is not, therefore, perceived how it is possible for any stipulation contained in the condition, to render the bond invalid. The condition requires nothing to be performed by the cashier, which might not have been required of him by a bond, conditioned in strict conformity to the act of incorporation. Under such a bond, it is true, the duties would have to be imposed upon the cashier through the medium of by-laws, but the adoption of by-laws would be the act of the directors, to whom the bond was executed, and, if competent, after the receipt of a bond from the cashier, to impose duties which his bond would oblige him to perform; what is it that can exclude the directors, when taking the bond, from adopting rules for the government of the cashier, and making those rules compose part of the stipulation in the condition of the bond?

2. The demurrer ought not, therefore, to have been sustained; but as the cause must be remanded for further proceedings in the court below, it is proper to remark that although the declaration contains a good cause of action, some of the breaches assigned are insufficient; so that, if a general verdict should be found for the plaintiffs upon the declaration as it now stands, the judgment might be arrested.

The judgment must be reversed, with costs, the cause remanded to the court below, and judgment there entered in favor of the plaintiffs in that court, upon the demurrer, unless the defendants should apply for leave to withdraw their demurrer and plead to the action, and such further proceedings there had as may not be inconsistent with this opinion.

SHACKLEFORD v. FOUNTAIN'S HEIRS.

[1 T. B. MONROE, 202.]

JUDGMENT, FORM OF.—A judgment in favor of "Joseph Fountain's heirs," without naming them, is not void.

ERROR *coram vobis*. Appeal from the Logan circuit. The opinion states the case.

Crittenden, for the appellants.

Monroe, for the appellees.

By Court, MILLS, J. This is a writ of error *coram vobis*, brought to set aside an execution and replevin bond. The defendants, now appellees, pleaded *in nullo est erratum*, and the court below gave judgment dismissing the writ, with damages and costs, from which the plaintiffs below have appealed.

The only supposed error relied on as sufficient to vacate the execution and replevin bond is, that the judgment was entered, the execution issued, and the replevin taken in the name of Joseph Fountain's heirs, without naming them individually. If the court below rendered such judgment, even if it is erroneous, we cannot say that it is void for the uncertainty. If it is not void, it must be capable of execution, and no execution or replevin bond ought, therefore, to be quashed for pursuing it strictly. If, however, the heirs of Joseph Fountain were rightly and individually named in the original record, but omitted by the clerk, in the judgment and execution, as appears, by the petition of the appellants, to be the case here, we entertain no doubt that the judgment, and all subsequent proceedings, are amendable as other clerical misprisions, by inserting the names of the heirs in the proceedings throughout, the record itself being a sufficient warrant and guide to the amendment.

The judgment of the court below is, therefore, correct, and must be affirmed, with costs and damages on the damages given in that court.

THE CASE OF COCHRAN'S WILL.

[1 T. B. MONROE, 264.]

WILL—LUCID INTERVALS.—If the testator was, from some time prior to executing his will until his death, deranged by habitual intemperance, but having some lucid intervals, it must be shown to establish the will, that it was made in one of those intervals.

APPEAL from the Mercer county court. The opinion states the case.

Haggin, and Sharp, Attorney-general, for the devisees

Barry and Crillenden, for the heirs.

By Court, BOYLE, C. J. The execution of the will was proved by the two subscribing witnesses, and the only question is as to the sanity of the testator's mind. That for some time before the execution of the will, and until his death, the testator's mind was, in general, in a state of derangement, produced by the habitual and intemperate use of ardent spirits, can not, we think, be doubted. He enjoyed, no doubt, in that period, some intervals, in which his mind might be deemed competent for the purpose of making his will; but to justify the establishment of the will, it ought to be shown by clear and satisfactory testimony, to have been made in one of those lucid intervals. This, we think, has not been done. The two subscribing witnesses were wholly incapable of testifying to the sanity of the testator's mind, and the testimony of the only other witness present at the execution of the will, is inconclusive and unsatisfactory.

The order of the county court refusing to admit the will to record, must be affirmed, with costs.

LUCID INTERVALS—PRESUMPTION.—The general rule is, that every man is presumed to be sane until the contrary is shown, and, therefore, the burden of proof is on the party alleging incompetency to make a will or contract, by reason of mental unsoundness, to prove that fact; but when general or habitual insanity is once shown to have existed during a given period, and a will or contract is made at any time within that period, it will be presumed that the general condition of mental unsoundness existed at that particular time; and, therefore, if it is claimed that such will or contract was made during a lucid interval, the party asserting it must prove it: *Attorney-general v. Parnter*, 3 Bro. C. C. 441; *Hall v. Warren*, 9 Ves. 605; *Holyland, Ex parte*, 11 Id. 10; *White v. Wilson*, 13 Id. 87; *Grabill v. Barr*, 5 Pa. St. 441; *Harden v. Hayn*, 9 Id. 151; *In re Gangwere's Estate*, 14 Id. 417; *Gombault v. Public Administrator*, 4 Bradf. Surr. 226; *Achey v. Stephens*, 8 Ind. 411; *Menkins v. Lightner*, 18 Ill. 282; *Lilly v. Waggoner*, 27 Id. 395; *Ballew v. Clark*, 2 Ired. 23; *Staples v. Wellington*, 58 Me. 453; *Hix v. Whittemore*, 4 Met. 545; *Purveyar v. Reese*, 6 Cold. 21; *Porter v. Campbell*, 58 Tenn. 81; *Taylor v. Creswell*, 45

Md. 422; 1 Redf. on Wills, 113; 1 Whart. & Stille, Med. Jur., sec. 61. The law of this subject is thus laid down by Lord Chancellor Thurlow in *Attorney-general v. Parnter*, 3 Bro. C. C. 441:

"If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement; if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement."

But there is no presumption against the sanity of one who was formerly a lunatic, after a complete restoration to reason: *Snow v. Benton*, 28 Ill. 306. Nor does any such presumption arise where the existence of insanity, even of a permanent character, several years after the making of the will or contract, is shown: *Taylor v. Creswell*, 45 Md. 422.

RULE APPLIES ONLY TO HABITUAL INSANITY.—The rule above stated as to the presumed continuance of insanity once shown to exist, applies only to cases where the insanity is general or habitual: *Cartwright v. Cartwright*, 1 Phillim. 100. Unless the derangement of the faculties has become the ordinary mental condition of the person whose acts are in question, there is no ground in reason or law for an inference against his sanity at the time of any particular act. The presumption of law is, simply, that the ordinary mental condition of a party continues, whether that condition be one of general sanity, with occasional and temporary lapses into insanity; or one of general insanity, with occasional and temporary periods of apparent sanity. Hence, there is no presumption of the continued existence of temporary hallucinations, or delusions resulting from disease: *Staples v. Wellington*, 58 Me. 453. If there is no proof of habitual insanity, but occasional acts of folly occurring at periods distant from each other, are shown, there is no presumption of incompetency at the time of performing any particular act: *Chandler v. Barrett*, 21 La. An. 58. Nor is there any presumption of the continuance of a condition of mental unsoundness produced by the violence of disease: *Hix v. Whittemore*, 4 Met. 545.

PROOF NECESSARY TO SHOW LUCID INTERVAL.—The doctrine of the principal case, that where habitual or general insanity is shown, and a lucid interval is relied on, it must be clearly and satisfactorily proved, is in accord with what is said by Lord Thurlow in *Attorney-General v. Parnter*, *supra*. There must be something more than a mere cessation of the violent symptoms of the disorder to constitute a restoration of mind sufficient to support a will or contract: *Hall v. Warren*, 9 Ves. 605. And the lucid interval must be shown to have existed at the very time of the act in question. It will not suffice to show lucid intervals immediately before, and immediately after, the act; for the continuance of a lucid interval is not to be presumed: *Harden v. Hays*, 9 Pa. St. 151.

LOCKE v. COLEMAN.

[2 T. B. MONROE,* 12.]

LEASE BY DEFENDANT AFTER EXECUTION.—A purchaser under execution can recover the land notwithstanding a lease made by the defendant after the levy.

TENANT NOT ENTITLED TO NOTICE.—The tenant under such a lease does not hold under the purchaser, and is not entitled to notice to quit.

DELAY IN SELLING AFTER LEVY of an execution does not destroy the lien.

MAKING A SINGLE SALE UNDER DISTINCT EXECUTIONS, if it be an irregularity, does not affect the purchaser's right of recovery.

ASSIGNMENT OF EXECUTION TO OFFICER.—That one of the executions under which a sale was made was assigned to the deputy making the sale does not affect the purchaser.

APPEAL from the circuit court. The opinion states the case.

Crittenden, for the appellant.

Bibb, for the appellee.

By Court, DAVIDGE, J. This was an action of ejectment, in which Coleman was the lessor of the plaintiff, and Locke and Flemming were defendants below. It appears from a bill of exceptions, taken in the case, that Coleman claimed, by purchase, under six executions against Finley, the former proprietor of a house and lot, on which several of the executions had been levied, prior to the date of the lease under which the defendants claimed title, and a deed made to Coleman, by the sheriff, bearing date the thirteenth of March, 1823. The sale was made the twenty-first of February, 1823, to satisfy the said several executions, writs of *venditioni exponas* having issued. The sheriff set all the premises up, and sold under all the executions, at the same time and without discrimination, except that three hundred dollars and some odd were to be paid in hand, and for the residue, bonds were to be given. The property sold for one thousand two hundred and fifty dollars, a sum less than the

* The decisions reported in 2 T. B. Monroe were made by a new court of appeals organized under an act approved December 24, 1824, the judges of said court being Hon. William Taylor Barry, chief justice, and James Haggin, John Trimble and Resin Davidge, associate justices. This act was, however, declared unconstitutional, and was repealed by the legislature, December 30, 1826, and the former court of appeals re-established. For this reason the decisions in 2 T. B. Monroe are not regarded as authoritative in the courts of Kentucky, and are not included in Monroe and Harlan's Digest. They are given, however, in the Digests of Messrs. Stanton and Barbour. As they were pronounced by eminent and learned lawyers who believed themselves to be acting under the responsibilities of judicial station, and who gave to the questions submitted to them the same degree of attention that would be given by a constitutional court, though not actually binding as authority, they are nevertheless of value, being, as Mr. Stanton says in the preface to the first volume of his Digest, "at least persuasive of what the law is."

amount of the executions. It also appears that one of the executions was assigned to Redman, the deputy sheriff, by whom it was levied, and that another was the property of one Patton, the deputy who made the sale. All these writs of *venditioni exponas*, the executions that preceded them, the judgments upon which they were issued and the proceedings at law in each case, were read in evidence; and it being proved that the defendants were in possession of the house and lot at the time of the ejectment brought, the counsel for the defendants moved the court to give the following instructions to the jury:

1. "That from the evidence, the law was for the defendants, and that the verdict should be for them, on the ground that the lessor of the plaintiff, having purchased the property as that of Finley, could not recover against the lease of Finley to the defendants, he being estopped by the lease; 2. That the defendants were tenants at will, or *quasi* tenants at will, of the lessor, and he not having given six months' notice to quit before bringing the ejectment, could not recover; 3. That if the jury should be of opinion, from the evidence, that the foregoing executions had been held up an unreasonable time from the levy, before a sale was effected, the law was for the defendants." All of which instructions were overruled by the court, to which the defendants excepted. They then proved and read in evidence a lease from Finley for five years, bearing date the fourth of March, 1822. The jury found a verdict for the lessor of the plaintiff, and the defendants moved for a new trial, which was overruled by the court. The defendants excepted, spread the evidence on the record, and appealed.

The errors assigned question the correctness of the opinion of the court below in refusing to give the instructions asked; and whether the court erred in refusing to give the instructions is the only point necessary for this court to decide. It would seem from the first instruction asked that the counsel for the defendants below thought, as Coleman derived title under Finley, that he was estopped by Finley's lease. Whatever weight this idea might be entitled to, under a different state of case, we apprehend it cannot affect the present as before, and at the time the lease purports to bear date, there were several executions actually levied on the house and lot, and remained unsatisfied, and which we conceive operated as a lien thereon. To allow the lease, under such circumstances, to work an estoppel, would be to allow a person, whose property was bound by an execution, to make a lease to a third person, and

thereby deprive his creditors from selling it; and thus carry the doctrine of estoppel beyond the bounds of reason or justice. The second instruction is predicated on the idea that the lessees were tenants at will, and, therefore, six months' notice to quit was necessary to be given before the action could be maintained. This idea is negatived by the fact apparent on the face of the lease, which shows they were tenants for the term of five years; and a notice to quit was not necessary. The third instruction appears to be bottomed upon the notion that after an execution is levied, the officer is bound to sell within a fixed time, or the execution ceases to bind the property. But this is not like the case of an execution which has not been levied, in which case it would be necessary to be kept up by new executions to bind the property. When an officer has once levied, he may sell at any time, and the lien continues until he does sell.

It has been said in argument that the sheriff's sale was illegal and void, because, as the executions were several, the sales should have been separate and distinct. We are not apprised of any law that compels an officer who has several executions in his hands which are levied on the same property to make distinct sales on each, although, we are persuaded, it is the most regular way; but his selling under all at the same time, if improper, can only be considered as an irregularity in conducting the sale, which would render him liable to an action by any person aggrieved, but would not affect the purchaser, or render the sale void. It has been contended that no more of the house and lot should have been sold than was sufficient to satisfy each execution. It will be unnecessary to decide how far a house and lot is subject to division, as in this case the executions more than cover the amount for which the property sold.

Thirdly and lastly, it has been urged that the sheriff who conducted the sale was interested in one or more of the executions under which the property was sold. It does not appear that the executions were in his name, and we do not conceive a purchaser is bound to notice an indorsement on an execution which is for the benefit of a third person, although it be for the officer himself. If the executions which came to hand, and were levied after the lease bears date, and in which the officer that made the sale had an interest by indorsement thereon, did not convey an authority to sell on them, they certainly could not impair or divest the authority which he de-

rived from those which came to hand and were levied prior to the date of the lease. But, admit it was irregular to unite the executions, we conceive it would only affect the officer, and not the creditor or purchaser, neither of whom had any agency in conducting the sale. It has been decided, if property is sold to a stranger by an execution voidable but not void, or sold under an execution in an erroneous judgment, which is afterwards reversed, the sale will nevertheless be valid: 2 Bibb, 202, 506; 8 Co. 96; 1 Bac. 34. The law forbids the officer to sell land where there is sufficient personal estate, or to sell property taken under execution without advertising it; yet the sale is good in either case: 2 Bibb, 403; 3 Id. 216.

We agree in opinion with the court below, and think that court properly refused to give the instructions asked. The judgment below must be affirmed with costs.

TRIMBLE and HAGGIN, JJ., were absent.

SMALLEY v. ANDERSON.

[2 T. B. MONROE, 56.]

WORDS IMPUTING ADULTERY to a married woman are actionable by statute, but not at common law.

PLEA TO THE WHOLE ACTION must answer all the declaration.

IN AN ACTION FOR SLANDER OF A WIFE, the husband and wife must join, and the declaration properly concludes to the damage of the plaintiffs.

REFUSAL OF A CONTINUANCE IS NOT REVIEWABLE in this court under our statute.

ERROR to the circuit court. The opinion states the case.

Bibb, for the plaintiff in error.

Thul, for the defendants in error.

By Court, TRIMBLE, J. This was an action of slander, brought by Anderson and wife, for the words alleged to have been spoken of the wife by the defendant, importing a charge of adultery. The defendant filed a special plea, to which the plaintiffs demurred; and the demurrer being joined by the defendants, was sustained by the court. The defendant then pleaded not guilty, upon which issue was made by the plaintiffs. A motion was then made by the defendant for a continuance upon an affidavit filed; which motion was overruled. A verdict was found for the plaintiffs, upon which judgment was rendered and the defendant has brought the case before this court by writ of error with supersedeas.

The first question presented for the decision of this court is, whether the declaration contains good cause of action. It is admitted that words of similar import are not actionable, upon the principles of the common law, as was decided in the case of *Elliott v. Aylesbury*, 2 Bibb, 473 [5 Am. Dec. 631]; but since the passage of the act of 1811, 1 Dig. L. K. 264; 4 Lit. L. K. 385, there can be no doubt that such words are actionable: *Morris v. Barkley*, 1 Lit. 64; *Philips v. Wiley*, 2 Id. 153. Another question is, whether the plea to which the demurrer was sustained is sufficient to bar the action. The plea is to the whole action; but it does not even attempt to give any answer to the most material charges in the declaration. If therefore the plea was otherwise unexceptionable, that objection is conclusive against its validity: *Morris v. Barkley*, 1 Lit. 64; 1 Chit. 509; Co. Lit. 303; 1 Saund. 28, note 3. It has also been objected to the declaration that it concludes to the damage of both plaintiffs instead of concluding to the damage of the wife. This objection is clearly untenable. The principle is well settled that for any personal injury done to the wife, she can not sue alone, but must join with her husband, and that the declaration ought to conclude to the damage of both: 1 Chit. Pl. 612, and the authorities there cited.

As to the decision of the court below in overruling the defendant's motion for a continuance, the sixteenth section of the act of assembly, establishing this court, prohibits the court from reviewing the decision of any court in granting or refusing a continuance of a cause: Session acts of 1824, 1848 to 1849.

The judgment must be affirmed with damages at the rate of six per cent. per annum from the day of the date of the supersedeas up to this time. The defendants in error must recover their costs in this court.

DAVIDGE, J., absent.

WORDS ACTIONABLE PER SE.—This subject is discussed at length in the note to *Coburn v. Harwood*, 12 Am. Dec. 39.

BRITE v. GILL.

[2 T. B. MONROE, 65.]

WORDS ARE NOT ACTIONABLE PER SE unless they impute a crime liable to punishment.

THE WORD "THIEF" is not actionable unless intended to impute a felony; hence, if it be accompanied by other words showing that it was spoken with reference to a mere breach of trust, an action will not lie.

THE RELATION IN WHICH WORDS WERE USED, which are charged as slanderous, may be shown under the general issue, or by a special plea in bar, to prove that they were not intended to impute a crime; and, if specially pleaded, it is the province of the court to decide whether the words are slanderous or not.

ERROR to the circuit court. The opinion states the case.

Crillenden, for the plaintiff in error.

Sharp, for the defendant in error.

By Court, BARRY, C. J. The plaintiff alleging that he was a tavern-keeper in the employ of the defendant, charges, in his declaration, that the defendant, in speaking of his conduct, uttered the following slanderous words: "Albert Brite stole sugar and coffee; he (the plaintiff meaning) took sugar and coffee enough of mine (the defendant meaning) to last him twelve months." The second count has these words: "Albert Brite stole my tea-spoons." The defendant justifies in three several pleas, stating in substance that before speaking the words of the plaintiff he was and had been for some time in his employ as a tavern-keeper, in a house belonging to the defendant; that he had furnished sugar, coffee, spoons, etc., for the use of said tavern, and gave them in charge to the plaintiff; that he had wasted and destroyed them, and mismanaged the business of the defendant to his great injury; that he demanded an account of the plaintiff, and in the settlement with him had great cause of complaint on account of the loss and waste of sugar, coffee and tea-spoons occasioned by the neglect and mismanagement of the plaintiff; that the defendant did, afterwards, in conversing with a certain John Logan, junior, and in his presence only, on the subject of the waste and destruction aforesaid, and the mismanagement and breach of trust which the plaintiff had been guilty of as to the sugar, coffee and tea-spoons that had been thus furnished and in relation to no other subject whatever, speak the words charged in the declaration.

To these pleas the plaintiff demurred, the defendant joined, and judgment was rendered in his favor, to reverse which the plaintiff prosecutes this writ of error. The sufficiency of the pleas is the question for the consideration of the court. It is not attempted to justify the truth of the words as charged in the declaration. The defense is placed on the ground that the words were spoken free from the imputed malice, in a sense not defamatory, the defendant relying that the circumstances pleaded showed a breach of trust merely; that although the

words in the declaration imported felony, the conversation in which they were used so explained them as to satisfy the hearers that no such charge was intended. To maintain this action it is essential that the words should contain an express imputation of some crime liable to punishment, some capital offense, or other infamous crime or misdemeanor. An imputation of the mere defect, or want of moral virtue, moral duties or obligations, is not sufficient. Hence it has been decided that to call a man a thief is not actionable unless it be intended to impute felony to him. Where the expression is accompanied with other words, which clearly denote that the speaker did not intend to impute felony to the party charged, no action can be maintained.

In an action of slander, the words proved were: "He is a thief, for he has stolen my beer." It appeared in evidence that the defendant was a brewer, and that the plaintiff had lived with him as a servant, in the course of which service he had sold beer to different customers of the defendant, and received money for the same which he had not duly accounted for. The judge directed the jury to consider whether the words were spoken in reference to the money received and not accounted for by the plaintiff, or whether the defendant meant that the plaintiff had actually stolen beer; for, if they referred to the money not accounted for, that being a mere breach of contract, so far explained the word thief as to make it not actionable. So, if a man says to another, "You are a thief, for you stole my tree," it is not actionable, for it seems he had a trespass and not a felony in contemplation: *Salw. N. P. 1158, 1159*. The same doctrine is recognized in the case of *Dexter v. Taber*, 12 Johns. 240. The slanderous words in that case were: "You are a thief." The witness who proved the speaking of these words went on to explain in what connection and in reference to what subject the words were spoken, viz.: "You are a thief; you have stolen hoop-poles and saw-logs from off Delancy's and Judge Myers's land;" alluding to certain woodlands belonging to these persons. A verdict was found for the defendant, and the court refused a new trial because the words were not actionable.

Another case to the same effect is reported in 1 Johns. Cas. 279, of *Vanransalear v. Dale*, the words charged in the declaration were: "John Kateing is a damned rascal as ever lived, and all who joined his party in the procession on the fourth of July (meaning the said Vanransalear, and the party and procession

in which the said John Kateing acted as captain on the said fourth of July) are a set of black-hearted highwaymen, robbers and murderers." On the part of the defendant, it appeared that previous to the speaking of the words there had been a public procession, in which Kateing commanded an artillery company, which formed part of the procession, attended with music; that a Mr. Bird claimed one of the instruments of music, a bass viol, and went to take it, but it was refused and retained by force; an affray ensued, in which Bird received a dangerous wound. The words charged were proved to have relation to this transaction, and that the words "highwayman, robber and murderer," were used in reference to the treatment of Mr. Bird, in withholding the bass viol, and stabbing him. The court decided that the words thus explained, as to their meaning, were not actionable. These modern decisions are in conformity with the principles settled in the case of *Lord Cromwell*, 4 Co. 14, and which, it is believed, have been maintained by a uniform cause of decision since that time.

Although these matters of defense may, and in modern practice most usually are, given in evidence under the general issue of not guilty, yet it is competent for the defendant to rely on them by a plea in bar. When the sense of the words is collected and fully presented in the plea, it is the province of the court to decide whether the words are slanderous or not. It is remarked in the case referred to in Coke, where a plea of this kind was held good, "that the defendant should never be put to the general issue, where he confesses the words and justifies them, or confesses the words, and, by special matter, shows that they are not actionable." See also to this point, 1 Saund. 131, n. 1. The principles advanced, which appear to be so well settled by repeated adjudications, must be regarded as decisive of the present controversy. The possession of the sugar, coffee and tea-spoons, furnished the plaintiff for the use of the tavern, being lawfully acquired, they were subject to his control, and no act of waste or embezzlement could subject him to the charge of felony. The defendant escapes from the consequence of the words, as charged in the declaration, by the colloquium, at the time of speaking them, which qualifies them and shows that a felony was not committed, and was not intended to be charged on the plaintiff. From this view of the case, we should have no difficulty in affirming the judgment of the circuit court, but for a defect discovered in the defendant's first plea. In the commencement, it refers to both counts of the declaration, but

is only responsive to the first, and does not traverse the charge in the second count. The demurrer of the plaintiff should have been sustained as to this plea. The court erred in not doing so.

For this cause, the judgment is reversed with costs; the cause remanded with directions to enter judgment on the demurrer in favor of the plaintiff as to the first plea, with leave to withdraw his demurrers as to the second and third pleas, and reply to them, if he elects to do so, and, on failure, that the judgment against him on those pleas, be made absolute.

WORDS ACTIONABLE PER SE.—See the note to *Coburn v. Harwood*, 12 Am. Dec. 39, where this subject is discussed. See also *Smalley v. Anderson*, ante, 121.

WELCH v. WELCH.

[2 T. B. MORRIS, 83.]

PROOF OF WILL.—Where one witness to a will devising land, testified that by direction of the testator, and in her presence, and that of another witness, he signed the testator's name, and subscribed his own as a witness; and the other witness testified that he heard the testator acknowledge the will, and that he subscribed it as a witness, at her request, and in her presence, the proof was held sufficient.

APPEAL from the county court. The opinion states the case.

Sharp, for the appellant.

By Court, TREMBLE, J. A writing purporting to be the last will and testament of Mary Falker, was produced in the county court of Bullitt, in which she last resided, and offered for probate by William Welch, jun., one of the devisees. Another man of the name of William Welch, and John Huston, appeared in court, and opposed the admission of the will to record. Upon hearing the testimony of the subscribing witnesses, the court were of opinion that the proof was insufficient to establish the will, and refused to permit it to be recorded. Welch, the devisee, has appealed to this court; and the question presented for our determination is, whether the proof is sufficient to establish the will.

One of the subscribing witnesses proves that he wrote the will pursuant to the instructions of the testatrix, and then read it over to her; that she was sick, but her mind was unimpaired, and that she recovered of her illness, and afterwards lived for nearly a year; that he signed her name to the will, in her pres-

ence, and by her directions, and in the presence of the other subscribing witness, and attested it by subscribing his name thereto, in her presence. The other subscribing witness states that he does not recollect whether the will was signed in his presence or not, but that the testatrix acknowledged it in his presence, and that he attested it by subscribing his name thereto, in her presence, and at her request; that at the time of the acknowledgment and attestation of the will, she was sick, but her mind was unimpaired. As the will contains some devises of land, the sufficiency of the proof must be tested by the act of assembly concerning wills. The first section of that act requires that a will in which lands are devised shall be signed by the testator or testatrix, or by some person, in his or her presence, and by his or her directions, and moreover, if not wholly written by himself or herself, shall be attested by two or more competent witnesses subscribing their names in his or her presence: 2 Dig. L. K. 1242.

In this case the will was signed in the presence of the testatrix, and by her directions, and although but one of the witnesses proves the signing of the will, the other proves that it was acknowledged before him by the testatrix, and they both prove that it was attested by them, and that they subscribed their names thereto in her presence. This is certainly sufficient proof of the execution of the will, under the act of assembly; and consequently, the county court erred in refusing to admit it to record. It is, therefore, considered by the court that the order of the county court rejecting the probate of the said last will and testament of Mary Falker, deceased, be reversed; that the said will and testament be here recorded as fully proved, and the original transmitted to the county court of Bullitt to be there admitted to record as fully proved in this court, and that such other proceedings be had thereon as the laws direct in like cases. The appellant must recover his costs in this court.

PROVING WILL BY ONE WITNESS.—It is undoubtedly the settled doctrine in most of the states, that a will of realty may be established by one only of the attesting witnesses, if he can testify to a compliance with all the provisions of the statute relating to its execution: *Jackson v. Le Grange*, 10 Am. Dec. 237, and note; *Lindsay v. McCormack*, 12 Id. 387, and note; *Harper v. Wilson*, 2 A. K. Marsh. 465; *Hall v. Sims*, 2 J. J. Marsh. 511; *Gwinn v. Radford*, 2 Litt. 137; *Swift v. Wiley*, 1 B. Mon. 116; *Jauncey v. Thorne*, 2 Barb. Ch. 40; S. C. Redf. Am. Cas. on Wills, 655; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Thompson v. Seastedt*, 6 Thomp. & C. (N. Y.) 78; S. C. 3 Hun, 395; *Lamberts v. Cooper's Executors*, 29 Gratt. 61; *Doran v. Miller*, 78 Ill. 342;

Dewey v. Dewey, 1 Met. 349; and see the note to *Burwell v. Corbin*, 10 Am. Dec. 516. Thus, in *Dewey v. Dewey*, 1 Met. 349, the will was established, although one witness only deposed to a due execution, the other witness testifying that he did not recollect attesting the instrument, though he admitted his signature to be genuine. So in *Nelson v. McGiffert*, 3 Barb. Ch. 158; and *Thompson v. Seastedt*, 6 Thomp. & C. (N. Y.) 78; S. C. 3 Hun, 395, where only one of the witnesses could recollect the facts. So where only one witness could testify that he saw the testator sign: *Doran v. Mullen*, 78 Ill. 342. So where the witnesses contradicted each other as to whether there was a due execution of the will: *Trustees of Theological Seminary v. Calhoun*, 25 N. Y. 422; S. C. 62 Barb. 381; *Tarrant v. Ware*, reported in a note to the case last cited, 25 N. Y. 422, and authorities cited in the opinion of Denio, J.; *Jenkins' Will*, 43 Wis. 610.

A contrary doctrine seems to be laid down in *Burwell v. Corbin*, 10 Am. Dec. 494; but that case, on this point, appears to have been repudiated in subsequent decisions in the same state: *Dudleys v. Dudleys*, 3 Leigh, 436; *Lamberts v. Cooper's Executor*, 29 Gratt. 61. See, also, the note to *Burwell v. Corbin*. In Pennsylvania it has long been provided by statute that a will must be proved by two witnesses. The rule resulting from this provision is thus stated by Gibson, J., in delivering the opinion of the court in *Hock v. Hock*, 6 Serg. & R. 47: "Proof of execution must be made by two witnesses, each of whom must separately depose to all facts necessary to complete the chain of evidence, so that no link of it may depend on the credibility of but one. When the evidence is positive there can be no difficulty, for the witnesses then attest the simple fact of execution itself; but where the evidence of one or both is circumstantial, each must make proof complete in itself, so that if the act of assembly were out of the question, the case would be well made out by the evidence of either. Circumstantial proof can not, therefore, be made by two or more witnesses alternating with each other as to the different parts of the aggregate of circumstances which are to make up the necessary sum of proof; the evidence of each not going to the whole." This rule is approved and applied in *Derr v. Greenawalt*, 76 Pa. St. 239. It is not necessary, however, that both witnesses should be subscribing witnesses in order to meet the requirements of the statute: *Carson's Appeal*, 59 Pa. St. 493; and circumstances established by independent testimony may supply the place of one witness: *Jones v. Murphy*, 8 Watts. & S. 295; followed in *Carson's Appeal*, 59 Pa. St. 493. In Delaware it was held in *Rash v. Purnell*, 2 Harr. 448, that where a statute requires two witnesses to the execution of a will, it must be proved by two, but that if one of the subscribing witnesses should deny his attestation he may be contradicted.

IF NONE OF THE WITNESSES RECOLLECT THE FACTS, or if they all testify that the will was not duly executed in some particular, it may still be established by circumstantial or presumptive evidence. Thus, where subscribing witnesses testify that they do not remember the circumstances, but recognize their signatures, and declare that they never would have attested the instrument without seeing the testator sign it or hearing him acknowledge it, due execution may be inferred: *Pate's Administrator v. Joe*, 3 J. J. Marsh. 113. So, where the attestation clause states that the requirements of the statute were complied with, and the signatures are genuine, and there are also corroborating circumstances, and no evidence to the contrary, the will may be established, although the witnesses testify that they remember nothing of the transaction: *Kellum's Will*, 52 N. Y. 517. So, where only the handwriting of the witnesses is proved, the witnesses being dead: *Jackson v. Van Dusen*,

4 Am. Dec. 330. So, where the witnesses testified that the testator was not of sound mind, the will was established by proving his competency *aliunde*: *Love v. Jolliffe*, 1 W. Bl. 365; *Howard's Will*, 5 T. B. Mon. 199.

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MARTIN'S ADMINISTRATOR v. UNITED STATES.

[2 T. B. MONROE, 89.]

ACTS OF AGENT, HOW FAR BINDING.—The acts of an agent, whether of the government or of an individual, are binding on the principal only to the extent of the authority conferred.

A POWER TO COLLECT implies only an authority to demand and receive the thing due on an obligation, and not an authority to commute for any other thing.

A GOVERNMENT COLLECTOR OF REVENUE has no power, without special authority, to receive anything but money on a demand due the government. Hence, a plea of payment of such a demand to a collector, in anything but money, must aver a special authority to receive it.

APPEAL from the circuit court. The opinion states the case.

Sharp, for the appellant.

Bibb, United States district attorney, *contra*.

By Court, HASEIN, J. Edward Martin, on the first day of November, 1816, executed his obligation to the government in the penalty of four hundred dollars, conditioned for the payment of one hundred and ninety-one dollars and fifty cents, one year after date, to the collector of the sixth district, or such person as may be legally authorized to receive the same, being the amount of duty payable by him under an act of congress of the nineteenth of April, 1816, entitled, "An act to abolish the existing duties on spirits distilled within the United States, and to lay other duties in lieu of those at present imposed, etc." The obligation was put in suit in the Simpson circuit court, against the administrator of Edward Martin. The de-

Dewey v. Dewey, 1 Met. 349; and see the note to *Burwell v. Corbin*, 10 Am. Dec. 516. Thus, in *Dewey v. Dewey*, 1 Met. 349, the will was established, although one witness only deposed to a due execution, the other witness testifying that he did not recollect attesting the instrument, though he admitted his signature to be genuine. So in *Nelson v. McGiffert*, 3 Barb. Ch. 158; and *Thompson v. Seastedt*, 6 Thomp. & C. (N. Y.) 78; S. C. 3 Hun, 395, where only one of the witnesses could recollect the facts. So where only one witness could testify that he saw the testator sign: *Doran v. Mullen*, 78 Ill. 342. So where the witnesses contradicted each other as to whether there was a due execution of the will: *Trustees of Theological Seminary v. Calkous*, 25 N. Y. 422; S. C. 62 Barb. 381; *Tarrant v. Ware*, reported in a note to the case last cited, 25 N. Y. 422, and authorities cited in the opinion of Denio, J.; *Jenkins' Will*, 43 Wis. 610.

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IF NONE OF THE WITNESSES RECALLED THE FACTS, or if they testified that the will was not duly executed, or if the evidence was circumstantial, it may be established by circumstantial or preponderant evidence. Thus, where two witnesses testify that they do not recollect the facts, but that they saw the testator sign his name, and declare that he was of sound mind, and that he was signing the instrument without seeing the testator, the execution may be inferred from the circumstances where the attestation was complied with, and the evidence is preponderant. Thus, where the circumstances are established, although the witnesses are not subscribing witnesses to the transaction: *Kearney v. Kearney*, 10 Ky. 100. If the evidence of the witnesses is circumstantial, each must make proof complete in itself, so that if the act of assembly were out of the question, the case would be well made out by the evidence of either. Circumstantial proof can not, therefore, be made by two or more witnesses alternating with each other as to the different parts of the aggregate of circumstances which are to make up the necessary sum of proof; the evidence of each not going to the whole." This rule is approved and applied in *Derr v. Greenawalt*, 76 Pa. St. 239. It is not necessary, however, that both witnesses should be subscribing witnesses in order to meet the requirements of the statute: *Carson's Appeal*, 59 Pa. St. 493; and circumstances established by independent testimony may supply the place of one witness: *Jones v. Murphy*, 8 Watts. & S. 295; followed in *Carson's Appeal*, 59 Pa. St. 493. In Delaware it was held in *Rash v. Purnell*, 2 Harr. 448, that where a statute requires two witnesses to the execution of a will, it must be proved by two, but that if one of the subscribing witnesses should deny his attestation he may be excluded.

4 Am. Dec. 330. So, where the witnesses testified that the testator was not of sound mind, the will was established by proving his competency *aliunde*: *Low v. Jolliffe*, 1 W. Bl. 365; *Howard's Will*, 5 T. B. Mon. 199.

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MARTIN'S ADMINISTRATOR v. UNITED STATES.

[2 T. B. MONROE, 89.]

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A GOVERNMENT COLLECTOR OF REVENUE has no power, without special authority, to receive anything but money on a demand due the government. Hence, a plea of payment of such a demand to a collector, in anything but money, must aver a special authority to receive it.

APPEAL from the circuit court. The opinion states the case.

Sharp, for the appellant.

Bibb, United States Attorney, contra.

Howard Martin, on the first day of his obligation to the government in dollars, conditioned for the payment of ninety-one dollars and fifty cents, one collector of the sixth district, or such authorized to receive the same, being payable by him under a congress April, 1816, entitled to abolish Spirits distilled within the States, es in lieu of tax imposed, was put in on circuit Administrator. The de-

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4 Am. Dec. 330. So, where the witnesses testified that the testator was not of sound mind, the will was established by proving his competency *aliunde*: *Loose v. Jolliffe*, 1 W. Bl. 365; *Howard's Will*, 5 T. B. Mon. 199.

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MARTIN'S ADMINISTRATOR v. UNITED STATES.

[2 T. B. MONROE, 80.]

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APPEAL from the circuit court. The opinion states the case.

Sharp, for the appellant.
Bibb, United States Attorney, contra.

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fendant pleaded payment; and also, that on the — day of —, 1817, the intestate paid and delivered to Amos Edwards, a collector of the sixth district of Kentucky, who then and there held the said obligation, and was fully authorized to collect the same, a large quantity of whisky, to wit, four hundred gallons, which he accepted in discharge of the obligation. Upon the first plea issue was joined, and a verdict and judgment for plaintiff. To the second plea the defendant demurred, and the court sustained the demurrer. The defendant appealed, and the validity of the second plea is the only question for the consideration of this court.

It must depend entirely upon the authority of the collector to receive whisky in payment of the obligation. So far as the government, or an individual, shall confer an authority, so far only are they bound by the acts of an officer or agent; and when that authority is transcended, the agent becomes alone responsible: *Livermore on Agency*, 4-6. The plea sets forth no special authority, and none can be presumed. It avers in Edwards the power to collect, which we understand to demand and receive the thing due on the obligation; and money, not whisky, was due upon the writing in suit, agreeably to its tenor. It is not averred, and we know of no law or regulation applicable to the departments, which authorized the collector or agent of the United States, to commute for whisky, obligations to secure its revenue.

The plea, therefore, failing to show a special authority, and the government having conferred none by its acts, we are obliged to consider the agreement set forth in the plea of no validity against the plaintiff. Judgment affirmed, with costs and damages at the rate of six per cent., etc.

AGENT TO COLLECT CAN RECEIVE NOTHING BUT MONEY.—An agent who is simply empowered to collect a demand, can not without special authority, commute or compromise it or accept anything but money in payment of it: *Story on Agency*, sec. 99; *Ewell's Evans on Agency*, 117; *Ward v. Evans*, 2 *Ld. Raym.* 928; *S. C.*, 2 *Salk.* 442; *Bridges v. Garrett*, *L. R.* 5, *C. P.* 454; *Corning v. Strong*, 1 *Ind.* 329; *S. C.*, 1 *Smith's Ind.* 197; *Kirk v. Hiatt*, 2 *Ind.* 322; *McCarver v. Nealey*, 1 *G. Greene*, 360; *Graydon v. Patterson*, 13 *Iowa*, 256; *Aultman v. Lee*, 43 *Id.* 404; *McCulloch v. McKee*, 16 *Pa. St.* 289; *Woodbury v. Larned*, 5 *Minn.* 339; *Padfield v. Green*, 85 *Ill.* 529; *Rodgers v. Bass*, 46 *Tex.* 505; *Waterhouse v. Citizens' Bank*, 25 *La. An.* 77; *Ward v. Smith*, 7 *Wall.* 451. Thus in *Ward v. Evans*, 2 *Ld. Raym.* 928, a servant was sent with a claim for collection, and accepted a goldsmith's note, and it was held that the principal was not bound unless he authorized the receipt of such note or ratified it by acquiescence. But payment to an agent by a check, if the check is duly honored is good: *Bridges v. Garrett*, *L. R.* 5, *C. P.* 454.

per Cockburn, C. J. An agent to collect a claim cannot take in payment of it, a note to himself: *Corning v. Strong*, 1 Ind. 329; S. C., 1 Smith's Ind. 197; *McCulloch v. McKee*, 16 Pa. St. 289. Nor can he permit the debtor to set off a claim against the agent personally: *Bridges v. Garrett*, L. R. 5 C. P. 454; or take horses, wheat, or other property in payment: *Kirk v. Hiatt*, 2 Ind. 322; *Aullman v. Lee*, 43 Iowa, 404. And an agent to sell property and receive payment cannot take notes for such payment: *Scoby v. Branch*, 59 Tenn. (Baxter) 66, or exchange the property for other property: *Lumpkin v. Wilson*, 5 Heisk. 555, or apply it upon debts due from himself: *Stewart v. Woodward*, 50 Vt. 76. So, an agent to whom a note is intrusted for collection cannot sell it or otherwise dispose of it: *Hays v. Lynn*, 7 Watts, 524. And, if after recovering judgment on the note, he assigns such judgment in satisfaction of his own debt, it was held in *Padfield v. Green*, 85 Ill. 529, that the assignee might be enjoined from collecting it.

The same rule applies in the case of an attorney employed to collect a demand. Without special authority, his power is limited to receiving or enforcing payment in money. He cannot compromise, or release the demand until the money is paid; *Jackson v. Bartlett*, 8 Johns. 361; *Kellogg v. Gilbert*, 6 Am. Dec. 335; *Carter v. Talcott*, 10 Vt. 471. He has no authority to take the defendant's note: *Miller v. Edmonston*, 8 Blackf. 291, or a note on himself: *McCarver v. Nealey*, 1 G. Greene, 360; *Gullett v. Lewis*, 3 Stew. (Ala.) 23, or a note or bond of a third person: *Langdon v. Potter*, 13 Mass. 319; *Wilkinson v. Holloway*, 7 Leigh. 277; *Smock v. Dade*, 5 Rand. 639; *Smith v. Lamberts*, 7 Gratt. 138; *Wiley v. Mahood*, 10 W. Va. 206; or a draft or order on a stranger: *McCarver v. Nealey*, 1 G. Greene, 360; *Drain v. Doggett*, 41 Iowa, 682; or property of any kind, or indeed anything but money: *Wright v. Daily*, 26 Tex. 730; *Kent v. Ricards*, 3 Md. Ch. 392; *Harper v. Harvey*, 4 W. Va. 539; for he is regarded simply as a special agent: *Gullett v. Lewis*, 3 Stew. (Ala.) 23.

AGENT'S AUTHORITY TO TAKE PAPER CIRCULATING AS MONEY.—Where bank notes or other forms of paper currency, not a legal tender, are in general circulation as money, and are commonly received and paid out in business transactions as such, on a par with coin, or not materially depreciated, and that fact is known to a creditor placing a demand in an agent's hands for collection, an authority to receive such notes in payment of the demand may be implied, unless the principal expressly forbids it: *Rodgers v. Bass*, 46 Tex. 505; *Robinson v. International Life Assurance Society*, 42 N. Y. 54. Thus, a sheriff with an execution in his hands, being in this particular merely the agent of the plaintiff, may receive such notes in payment, unless specially instructed otherwise: *Governor v. Carter*, 14 Am. Dec. 588; *Atkin v. Mooney*, Phil. L. (N. C.) But, if the fact that such notes are, in general, circulation as money, is not known to the principal, no authority to the agent to receive payment therein can be implied: *Graydon v. Patterson*, 13 Iowa, 256.

CONFEDERATE NOTES.—Many of the cases in the United States on the subject of an agent's right to receive paper currency, which is not a legal tender, in payment of his principal's demand, have arisen with reference to the notes issued by the late southern confederacy. The decisions on this point are not harmonious. Many of them are in favor of the doctrine, that if, at the time and place of the payment, the notes were in common circulation as money, no material difference being made in business transactions between them and coin, the agent's authority to receive them, unless forbidden, may be implied, even though the principal did not reside within the limits of the confederacy: *Robinson v. International Life Assurance Society*, 42 N. Y. 54; *Pidgeon v.*

Williams, 21 Gratt. 251; *Hale v. Wall*, 22 Id. 424; *Atkin v. Mooney*, Phil. L. (N. C.) 31; *Rodgers v. Bass*, 46 Tex. 505. Thus, in the case last cited, a principal residing in Delaware appointed an agent in Texas, before the war, to sell certain land and to receive payment; the land was sold, and in 1862, shortly after the confederate currency made its appearance in Texas, and when it was generally received and paid out as money, no difference being made between it and coin, the agent accepted payment in confederate notes, and the payment was held good. Moore, J., delivering the opinion of the court, after stating that, unless there were special instructions requiring payment in gold and silver, an agent was authorized to receive "current bank notes, or other tokens generally taken and received in payment of debts and current in business transactions as money," said:

"The creditor, of course, has the right to exact the payment of his debt in such money as the law declares to be a legal tender. Why, then, may the agent, who is authorized merely in general terms to collect, without anything being said as to the character of the money in which he is to do so, receive payment in that which is not a legal tender? Unquestionably, because, by the authority given the agent, without restriction as to the kind of money he shall receive, it must be inferred that the principal intended, and his agent, as well as the debtor, understood that he was willing for his debt to be paid in such bank bills or other currency, as was generally taken and received by others, in payment of debts. The legal inference from an authority given an agent to collect a debt is, that he is authorized to receive money, current and at par with coin, usually received in like transactions by the community in general where the debt is paid. The agent, therefore, has no authority to sell or barter and exchange the note to the debtor, or any one else, for drafts, bills of exchange, or any kind of personal or real property. The inference to be deduced from the general authority given the agent to collect is, that he must do so in money. But in what kind of money shall this be done? Is it to be understood that in such cases the word 'money' is to be taken in its most restricted and limited sense, and should be held to refer to such gold and silver coin, or notes and bills, as are by the constitution and laws declared to be a legal tender; or is it to be taken and interpreted according to its popular use, and held to authorize the receipt of currency and bills recognized in general circulation, where the debt is to be paid, as money? We answer, in general, unless the language of the power is qualified or restricted, it should be held to import the latter. It, therefore, shows that such an agent is authorized by the power to receive whatever is generally recognized and treated in business transactions as money, and is at par, and readily convertible into money, made by law a legal tender, for the payment of debts, or where the discount upon it is so little as to have no material effect on its general circulation and value."

So, in *Robinson v. Life Assurance Society*, 42 N. Y. 54, an agent in Virginia of an English insurance company, received confederate notes in payment of premiums on a policy, at a time when they were in general use and were equal in value to circulating bank notes of Virginia, but were five per cent. below gold, and it was held that he had a right to do so. So, in *Hale v. Wall*, 22 Gratt. 424, an agent in Virginia of a principal residing in one of the loyal states, took confederate notes in payment of a claim when they were in general circulation as money, but were ten per cent. below gold, and it was held good. To the same effect was *Pidgeon v. Williams*, 21 Gratt. 251. So, in *Westbrook v. Davis*, 48 Ga. 471, it was held that a trustee was authorized to accept confederate notes when they were in general circulation as money,

and were received by prudent business men, although they were at a discount.

On the other hand, in *Harper v. Harvey*, 4 W. Va. 539, where an attorney residing within the confederacy accepted payment of a judgment in confederate notes, his client being a loyal citizen of the United States, it was held that such acceptance was unauthorized, and that the payment did not satisfy the judgment. So, in *Alley v. Rogers*, 19 Gratt. 366, where the owner of certain notes, who resided in one of the northern states, left them with a Virginia bank for collection before the war, and payment was received by the bank during the war in confederate notes, which were in general circulation as money, it was held that the principal was not bound. So, in *Fretz v. Stover*, 22 Wall. 198, the same doctrine is laid down. In *Waterhouse v. Citizens' Bank*, 25 La. An. 77, a bank in New Orleans having a claim for collection, took confederate notes at a time when they were the only currency in circulation, and it was held in an action against such bank, that the collection should have been made in lawful money, or if that were impossible, the principal should have been notified, or that the principal approved the acceptance of the notes. And where a claim was expressly payable in lawful currency of the United States, and was placed in an attorney's hands for collection, with authority to "exercise his discretion as to the procedure" to "enforce payment," an acceptance by him of confederate notes in payment, at a time when they were in general and exclusive circulation as money, was declared wrongful, and he was held liable: *Mangum v. Ball*, 43 Miss. 288. In *Webster v. Whitworth*, 49 Ala. 201, an agent was held liable for suffering confederate notes, received upon a debt due his principal, to remain on deposit until they became worthless.

No doubt in cases where both principal and agent, as well as the debtor, resided within the limits of the confederate states, an authority to such agent to receive payment in what in fact was the common currency of those states, and was generally received in business transactions as money, might well be presumed, in the absence of any positive instructions to the contrary. But it is difficult to see how such a rule can be applied to a case where the principal was a loyal citizen of the United States residing within the federal lines, and where, therefore, communication with his agent was not only impracticable but unlawful, so that no inference could reasonably be drawn against him from the fact that he did not forbid payment in confederate notes. Upon principle, therefore, the doctrine of *Harper v. Harvey*, 4 W. Va. 539; *Alley v. Rogers*, 19 Gratt. 366; and *Fretz v. Stover*, 22 Wall. 198, is preferable to that laid down in *Rodgers v. Bass*, 46 Tex. 505; *Pidgeon v. Williams*, 21 Gratt. 251, and *Hale v. Wall*, 22 Id. 424.

It is proper to remark in this connection that in *Rodgers v. Bass*, 46 Tex. 505, some stress was laid upon the fact that the notes upon which the payment was made were drawn to the agent, and he was the ostensible owner, but it was known to the maker that the land for which they were given belonged to the principal. Certainly where the principal clothes the agent with the apparent ownership of the demand, and the fact of the agency is not disclosed to the debtor, any payment accepted by the agent will bind the principal. Thus, where a judgment was assigned to an agent for collection, and he accepted confederate notes in satisfaction, without making it known that he was agent, the payment was held good: *Dillard v. Clements*, 58 Tenn. (Baxter) 137.

BRISTOW v. PAYTON'S ADMINISTRATRIX.

[3 T. B. MONROE, 91.]

UPON THE DEATH OF A DEFENDANT IN EXECUTION the sheriff cannot proceed without a revivor, even where a levy has been made, and if he does so, the execution may be quashed and restitution ordered.

MOTION TO QUASH BARRED BY LAPSE OF TIME.—A motion to quash an execution, for an irregularity in enforcing it without a revivor, after the defendant's death, must be made in reasonable time, or it will be barred; eleven years is not a reasonable time for such purpose.

LAPSE OF TIME is always regarded upon an application merely to correct irregularities, and not to promote substantial justice.

APPEAL from the circuit court. The opinion states the case.

Depew, for the appellant.

Taul, for the appellee.

By Court, BARRY, C. J. The appellant, after judgment against him in ejectment, in the circuit court, in favor of William Payton, had commissioners appointed under the occupying claimant laws, who reported a balance in his favor of six hundred and three dollars and sixteen and one half cents, for which the appellant had judgment at the February term, 1808. This judgment was subsequently revived by *scire facias*, and execution issued for the amount against Payton in November, 1810. A small amount was made on it. A second execution was issued on the fourth of February, 1811, upon which three hundred and ninety-one dollars and eighty-one cents was made. A third execution issued on the sixth of April of the same year was levied on personal estate, but not sold for want of time to advertise. On the fifth of June, 1811, a fourth execution was issued, and the balance of two hundred and four dollars and twenty-seven and one half cents was made by the sheriff, and paid to the plaintiff on the eleventh of July, 1811.

At the May term of the circuit court, 1823, Mary Payton, the administratrix of William Payton, had a rule against the appellant to show cause why the executions of the fourth of February and fifth of June, 1811, should not be quashed, because the said William Payton had departed this life before their emanation. In obedience to the rule the appellant appeared and opposed the motion, insisting that it was not the appropriate remedy, and that it was barred by the lapse of time. It was proved that William Payton died on the tenth of June, 1811. Upon this state of case the circuit court sustained the motion so far as to quash the execution that issued on the fifth of June, and ordered

restitution of the money that had been made under it, with interest; to reverse which judgment this appeal is prosecuted. After the death of the intestate, Payton, it was irregular for the sheriff to have proceeded further under the execution: *Waggon v. McCoy's executors*, 2 Bibb, 198. For this cause the execution might well have been quashed, and restitution ordered if the motion had been made in due time. Whether the statute of limitations applies to such cases is a question that does not appear to have been decided, but it would seem proper that motions of this nature should be made in convenient time. It is essential to the ends of justice and to the quiet and repose of litigants. What that time ought to be it is not necessary now to determine. It may be best to leave each particular case to rest on its own circumstances, under the sound discretion of the court. A distinction has been taken between cases where the grounds of the motion appear of record, and where they are to be made out by parol proof. In the former, time is not considered so important as in the latter. In the case of *Miller v. Anderson*, Litt. S. C. 169, where execution had issued after the year and day, without reviving the judgment, it was decided that it might be quashed on motion, although nearly seven years had elapsed. We are not favored with the reasons of the judge and cannot readily perceive the principle that justified the decision.

In the case of *McKinney v. Scott*, 1 Bibb, 155, a motion to quash an execution for an acknowledged irregularity was denied after the lapse of nine years from the time it occurred, and of seven after the money had been paid. The grounds of the motion, as in the present case, were made out by parol proof. In this case more than eleven years had elapsed after the error complained of before the motion to quash was made. Longer time ought, in reason, to be given to the representatives of a dead man than one who stands ready to assert his rights. It does not appear when the appellee administered on the estate of her husband. The presumption is from the emergency of such cases that it was shortly after his death. Allowing her one year to look into the condition of the estate of the intestate, and a still longer time will have intervened between the irregularity and the motion to quash than it did in the case referred to, of *McKinney v. Scott*.

When the policy of the law has limited to a much shorter time just demands for redress of injuries arising from actual error in judicial proceedings, courts cannot fail to regard the

lapse of time, when the object is to correct mere irregularities, and not to promote substantial justice. From the view taken we are satisfied that the court did wrong to sustain the motion.

The judgment of the circuit court is reversed, with costs, and the cause remanded, with directions to overrule the motion, with costs, etc.

BANK OF LIMESTONE v. PENICK.

[2 T. B. MONROE, 98.]

SURETY RELEASING PRINCIPAL TO TESTIFY.—Though a release operates only on present rights, yet where a surety, being sued alone, releases his principal from liability over, for the purpose of making him a witness, it is possible that the release may operate, because as the surety's right to indemnity arises when the contract is made, it may be regarded as a present right to take effect in future.

SURETY ESTOPPED BY RELEASE.—Whether such release be an absolute discharge or not, if it be accompanied by a covenant not to resort to the principal, the surety will be estopped from demanding remuneration from the principal in case the action goes against him, and the principal is therefore a competent witness.

BLANK FILLED UP WITHOUT AUTHORITY.—Where a blank note is filled up by the payee in a manner not contemplated or authorized by the maker, it is not binding upon him unless he ratifies it.

A SURETY SIGNING a note thus filled up in a manner not authorized by the principal, and without being apprised of such alteration, is not bound, and in order to charge him the payee must show that he knew the fact.

AN UNAUTHORIZED ALTERATION of an instrument by the obligee, though beneficial to the obligor, avoids it; as where a new surety is added.

A SURETY NEED NOT SIGN AT THE SAME TIME as the principal.

WHERE A SURETY SIGNS AFTER THE DISCOUNTING of a note, no new discount is necessary to bind him.

ERROR to the circuit court. The opinion states the case.

C. S. Bibb and Crittenden, for the plaintiff in error.

By Court, HAGEN, J. Richard Waters had an accommodation of five thousand five hundred dollars from the Bank of Limestone, secured by the indorsement of William Penick and Israel Jennings, and in the spring of the year 1820, being about to set out for Orleans, he deposited in the bank several notes drawn by him, payable to Penick, and indorsed by Penick and Jennings, to be filled in renewal of the transaction while absent. The note, which was under discount when he left the country, fell due on the eleventh of April, 1820, and the cashier filled up one of those blanks in the manner of the original transaction, and, as intended by the parties when it was deposited,

and had it discounted in satisfaction of the note then due; and on the same day, he so altered another of the notes which had been deposited with him by Waters, as to make it upon its face a joint and several note of Waters and Penick, payable directly to the institution, pasted a piece of paper at the foot of it, and presented it for the signature of Penick, who executed it accordingly, and in the month of June following, the cashier inserted the name of Jennings in the face of the latter note, as an additional obligor, and obtained his signature to it.

The cashier says that the latter note was substituted for the indorsed one, after the signature of Jennings, but no order was ever made discounting it. There is no controversy as to the consideration of the two last notes, and that in the shape of a joint and several note was obtained in consequence of an order of the board, requiring all its notes in that form. No intimation of this order, or of the change of the note, had been given to Waters until his return, which was in the month of June; but circumstances were proved which left it doubtful whether Penick was or was not apprised of the order of the board, and of the alteration in the note when he executed it; and it might possibly be inferred from the proof that Waters approved of it upon his return. To recite the proof, however, upon this subject, is deemed unnecessary, for its weight was with the jury. The cashier of the bank restored to Waters all the blanks, except two or three, one of which had been filled up, indorsed and discounted; one had been altered and used as above mentioned; and the other was produced in its original shape on the first trial of this suit. Upon the note so changed to a joint and several promise of Waters and indorsers, and executed under the circumstances recited, the bank instituted a separate action against Penick.

He pleaded: 1. Payment with notice of set-off, to support which, he relied upon the discount of the indorsed note; 2. That the note in suit was obtained by fraud; 3. *Non est factum*; and, 4. As in the second plea, stating moreover, that the note was obtained by the plaintiffs, and others in collusion with them, falsely and fraudulently representing to the defendant, that it had been executed by Waters and delivered to the cashier to get the signature of the defendant, and denying that Waters had executed it.

On the trial of the cause, the defendant introduced Waters as a witness, delivering him a release, which contained likewise a covenant, that, notwithstanding any recovery which

might be had against him, he would never call on Waters, or the other supposed security, for one cent. The testimony of Waters was calculated to prove that the notes left with the cashier by him were understood and intended to be filled up in the original form, and that he never approved or ratified the charge. To this the plaintiff objected; but the proof was admitted. The court instructed the jury:

1. That if they should find that the plaintiffs had filled up the note of Waters without his consent, binding him in a manner different from that contemplated or authorized by him when he delivered the blank to the plaintiffs, the obligation thus taken was not the deed of Waters, but void as to him, unless they should believe that he re-acknowledged or affirmed the same after it had been filled; and any act which clearly indicated the assent of the mind to stand to and perform a contract previously entered into was a confirmation.

2. That if the jury should find that the plaintiffs or their agent did not inform the defendant Penick that the note was filled up as above supposed, provided the jury should be satisfied that it was so filled, it was a fraud on Penick, and rendered the obligation void as to him, unless they should be satisfied, from the evidence, that Penick was fully apprised of its having been so filled, without the authority of Waters, and the proof of his having been so apprised, lies on the plaintiff.

3. If the jury should find that after the execution and delivery of the note sued on by Penick, the plaintiff inserted the name of Jennings, as a new party thereto, without the assent of Waters and Penick, it rendered the obligation void as to them, unless they, or one of them, afterwards confirmed the same; and in case it was confirmed by one only, it would be obligatory on him alone.

4. If the jury should be of opinion that, at the time (to wit, on the eleventh of April) this obligation was ordered to be discounted, it was not executed by Penick, his subsequent signature and delivery as security to Waters would not be obligatory on him, unless the note was again discounted or executed upon some consideration operating beneficially to himself or to his principal, or injuriously to the plaintiffs.

The jury found for the defendant. Judgment was rendered accordingly. The plaintiffs appealed, and it now becomes the duty of this court to consider the competency of Waters as a witness, and the correctness of the several instructions given on the trial. We have been referred to many authorities to

prove that one obligor may not be a witness for another, in a separate action; but they are all inconclusive because no release appears to have been executed in any of them. It is, however, contended that the release in the present case can avail nothing, upon the principle that a release can only operate upon a present right. The rule is unquestionable, still its applicability is not so clear. Upon the execution of the note in suit, if genuine, Waters incurred an obligation to indemnify Penick, his surety; and it is possible that by technical law, a release might bear upon that duty, as a present right to take effect in future: Co. Lit. 265; 9 Johns. 123; 4 Bibb, 331; and many of the cases which are supposed to bear upon this point are found, upon examination, to present only questions of construction, and not to depend upon the ability of the party in law to discharge the demand. To determine, however, that a release would or would not discharge Waters from all responsibility, does not seem to be indispensable. The heir apparent, it is acknowledged, cannot release to disseisor of his father, nor can he make a valid conveyance; but if he execute a release, or deed of conveyance, with covenant of warranty, he would be estopped to assert title to the estate, after the death of the parent; and we cannot perceive how it would be possible for Penick, failing in this suit, successfully to demand remuneration from Waters, notwithstanding the covenant contained in his release. We, therefore, suppose the witness was properly admitted.

We likewise concur with the circuit court in the first and second instructions given the jury. If the note was made and executed in the manner and under the circumstances supposed, it was certainly inoperative in law, and, in saying this, we do not consider the judge as invading the province of the jury, as contended by the plaintiffs. On the contrary, every fact was referred to the jury; nor do we consider it exceptionable in the judge to have required proof from the plaintiffs, that the defendant was apprised of the circumstances calculated to destroy the note, being transactions of the plaintiffs and their agents. Touching the third instruction, we apprehend the authorities are conclusive. Although no hardship could possibly result to Penick, by the insertion of the name of another security, yet, to protect deeds and written evidences from all possible violence, the law has forbidden any alteration, however immaterial, by the obligee: 11 Co. 27; Shep. Touch. 66. We do not very clearly understand the object or effect of the fourth instruction given by the circuit court; but it seems to maintain that, if the

note was received and discounted by the bank, with the signature of Waters only, and security being expected or required, Penick called and executed it on his part, a second discount by the bank was indispensable to bind Penick, unless some gain or loss shall have been subsequently enjoyed or sustained by some of the parties. We cannot concur in this. We cannot perceive the necessity or propriety of a second discount of the note. Nor do we understand why the obligation of the surety shall depend upon his execution of the note, at the same time it was executed by the principal. Such a defense, we believe, had not been recognized by the common law or chancery, nor can any of our statutes be construed to give it.

Judgment reversed, with costs, and further proceedings to be had consistent with this opinion.

ALTERATION OF INSTRUMENTS.—See *Woodworth v. Bank of America*, 10 Am. Dec. 239, and note; *Stephens v. Graham*, Id. 485; *Dea v. Wright*, 11 Id. 546; *Campbell v. McArthur*, Id. 737; *Babb v. Clemons*, 13 Id. 484. See also the note to *Tuckerman v. Hartwell*, 14 Id. 232.

SANDERS v. MORRISON'S EXECUTOR.

[2 T. B. MONROE, 109.]

REJECTION OF "ABOUT" IN CALLS OF ENTRY.—Where an entry calls for land on a certain creek, "about seven miles" from its mouth, the word "about" must be rejected, and the distance taken in a straight line from the mouth, if the stream is of sufficient length.

MEANDERS, WHEN FOLLOWED.—In such a case, if the stream is a large river, or is not of sufficient length, the meanders may be followed in measuring the distance.

APPEAL from the circuit court. The opinion states the case.

Sharp, for the appellant.

Bibb, and Crittenden, for the appellee.

By Court, HAGEN, J. This is a conflict between interfering entries. Sanders, held under the elder grant, and Morrison filed a bill, setting forth title under an entry in the name of Andrew Shrewer, for eight hundred acres of land, of the thirteenth of January, 1783, "on Eagle creek, a north branch of Kentucky, to include a salt lick in the middle of a square tract, about eight or nine miles from the mouth of said creek." Sanders controverted the specialty of this entry, and likewise relies upon his own in the name of John C. Richardson, for six hundred and sixty-seven acres of the seventh of July, 1780,

"on Eagle creek, about seven miles from the mouth, beginning on the north west side of said creek, one hundred and fifty poles therefrom, and to run south-east a distance sufficient to include the quantity in a square, by lines at right angles to each other."

Entertaining, as we do, an opinion favorable to the entry of the defendant, we deem it unnecessary to inquire into the validity of that of the complainant; because the defendant's is the elder, and when properly surveyed, will, we apprehend, cover all the land in controversy. By a variety of adjudications, to which we find no exception, the distance of seven miles is held to be locative, in the construction of this entry; the word about is to be rejected, and no part of the land to approach within less than seven miles of the mouth of the creek, upon a direct line: *Johnson v. Rowland*, Pr. Dec. 62, and *Nichols v. Wills*, Id. 307; *Whitaker v. Hall*, 1 Bibb, 72; *Green v. Watson*, 1 Id. 107; *Lockhart v. Trubul*, 2 Id. 250; *Smith v. Walton*, 3 Id. 153; *Carland v. Rowland*, 3 Id. 127; *Stephens v. Hedden*, 4 Id. 107; *Meriwether v. Philips*, 5 Litt. 182, and *Johnson v. Pannel*, 2 Wheat. In the case of *Whitaker v. Hall*, an opinion delivered upon rehearing and with great deliberation and ability, the words, "about one mile, an east course from Brashear's creek, along the road that leads from Harrodsburg to Beargrass," were located in a square, the lower line one mile with the road from the creek. Here it will be seen that, in running the distance, peculiar effect is due to the road. In *Green v. Watson*, an entry on Licking, "two hundred poles above McFall's claim, running up the creek," etc.; the distance was taken in a direct line. In *Lockhart's heirs v. Trubul*, the words, "one and a quarter mile below McFall's," were construed to require a direct line. In *Stephens v. Hedden*, the entry on Brashear's creek, "about four miles above the mouth" was held to require a straight line.

In *Johnson v. Pannel*, the supreme court, after a critical review of the state of adjudications, required the entry "beginning about twelve miles below the mouth of Licking, on a sugar tree and hickory, running up the river," etc., to be surveyed with the lower point precisely twelve miles with the meanders, rejecting the word about, and the allusion to unmarked trees, and distinctly declaring that if the stream had been small, the distance could have been taken on a direct line, and approving the construction given in the cases recited to the word from. And in *Meriwether v. Philips*, the court of appeals, in expounding an entry on Hardin's creek, "beginning about three miles

above Philip's station, on said creek, running thence south-west, two and a half miles, and from the beginning north-east, then at right angles from the extremity of each line for quantity," rejected the word about, recognized the direct line, and approved the construction given to the word from; but decided that entry bad, because of the want of some intimation upon which side of the base line the land was to lie; most clearly indicating that the word from would have obviated all difficulty.

We are apprised, however, of one other exception; as where the stream is not of sufficient extent to admit a direct line, the meanders may be pursued in ascertaining the distance. The entry of Richardson should be surveyed in a square, the lower line seven miles from the mouth of Eagle creek, in its lowest point, to begin one hundred and fifty poles from the creek on the north-west side, and to run south-east, and at right angles north-east for quantity; and thus surveyed, it seems, from the plat, it will still embrace all the land in controversy.

The decree reversed, cause remanded, and bill to be dismissed with costs.

BARRY, C. J., absent.

PUGH v. BELL.

[2 T. B. MONROE, 125.]

PURCHASER WITH NOTICE OF EQUITY.—When a defendant purchases land with notice of the plaintiff's equitable title, and that his vendor's only interest arises from his having paid part of the consideration of the contract, through which the plaintiff derives title, he will be compelled to convey to the plaintiff on repayment of that sum.

A PURCHASE FROM INFANT PLAINTIFFS avails nothing.

LIMITATIONS IN EQUITY.—Statutes of limitations do not, in terms, apply to equity suits, but stale demands are not favored by courts of chancery, and such courts adopt, with respect to equitable rights, the limitations prescribed by statute in analogous cases at law.

SUITS RESPECTING LAND ARE LIMITED usually by the shortest period allowed for actions to recover realty, and, in general, equitable rights must be asserted within twenty years.

TIME DOES NOT BEGIN TO RUN AGAINST heirs continuing in possession with the widow, under a bond for title, under which the father held, for the purpose of barring a suit against a purchaser, with notice, until the latter's conveyance is executed.

DOWER IN EQUITABLE TITLE.—Dower is not demandable in land held by the husband, under a bond for title, unless, before his death, the purchase-money has been fully paid.

COMPENSATION FOR IMPROVEMENTS ON EVICTION IS ALLOWED, where they have been made in good faith, because, though in law they belong to the

owner of the estate, in equity and conscience they belong to him who made them.

IMPROVEMENTS MADE BY A PURCHASER WITH NOTICE of an equitable title, cannot be made the subject of compensation, where such purchaser is the complainant; but if the owner comes into equity for relief, he must do equity by making compensation for such improvements, for his gain and the defendant's loss by the improvements are the same as if they were made without notice.

THE VALUE OF THE IMPROVEMENTS at the time of eviction, is the measure of compensation, and interest has no place in the computation.

COMPUTATION OF RENT against a *bona fide* occupant, should begin from the filing of the bill, but, against a *mala fide* possessor, from his entry, if within the period prescribed in the statute of limitations for actions for means profits.

RENT IS CHARGEABLE only on the premises as they were when received by the occupant or his grantor, exclusive of improvements made by them.

A DECREE WILL NOT BE OPENED TO TAKE NEW TESTIMONY as to the ages of complainants who lived in the defendant's neighborhood.

ERROR to the circuit court. The opinion states the case.

Bibb, for the plaintiff in error.

Sharp, for the defendants in error.

By Court, HAGEN, J. In the year 1789, a man of the name of Holsey, contracted for the sale of one hundred acres of land to Pugh, the same quantity to Bell, and one hundred and thirty acres to Rankin, of the pre-emption of Townsend. Holsey claimed by contract with Hoy, who purchased from Miller, who was the assignee of Townsend, and, being about to leave the country (for he resided in South Carolina) Holsey and the three to whom he had sold, went to Hoy, obtained a bond from Hoy to convey to Pugh, Rankin and Bell, their respective parcels, which was taken in charge by Pugh. Rankin sold to Shohem, and about the same period, 1789, Pugh, Shohem and Bell settled on their land. In a year or two Bell died, leaving four children and a widow, who married Smith, and shortly afterwards Shohem died also. In the year 1800, Miller, who had obtained his grant for the land, called on those who had purchased through Hoy, denied that Hoy had completed the payment of the price, and the tenants all so arranged it, that Miller conveyed to them their respective tracts, they paying or securing to him their portion of the money, which, as he represented, was due from Hoy. Pugh paid fifty dollars; the eldest son and only child of Shohem, then of full age, paid sixty-five dollars, and received a deed to himself; and Smith gave his bond, with security, for the payment for a horse worth fifty dollars, which he

afterwards satisfied, and Pugh being the security of Smith, by consent of the latter, the deed was made to Pugh, as an indemnity. They also united in an indemnifying bond to Miller, against Hoy's heirs, for Hoy was then dead. In October, 1801, Smith sold to Pugh, and delivered him possession, and in 1803 and 1806, Pugh made contracts for purchase from the heirs of Bell.

In May, 1807, the heirs of Bell filed their bill against Pugh, praying a conveyance of the land, and payment of rents, etc. At the August term, 1820, an interlocutory decree was pronounced, agreeably to the prayer of the bill; commissioners were appointed to demark boundaries, assess rents, etc., and they met in September of that year. At the May term, 1801, notice was taken of the death of Pugh, and an order of revivor against his heirs, who presented a petition to open the decree, but it was overruled. Mrs. Chiles, one of the heirs of Pugh, then departed this life; and at the May term, 1823, the following order was made: "The defendant, Nancy Chiles, having departed this life, by consent of the parties, it is ordered that this cause be revived in the names of and against Walter, Elizabeth, Thomas, John, Henry and William Pugh, her heirs and representatives." At the August term, 1823, a final decree was pronounced for a conveyance and payment of rent, reserving six months to the infant defendants, after the attainment of full age, to show cause against it. Pugh, in his answer, states that when they went to Hoy's to make the arrangement recited, Hoy consented to give his bond, and before he finished writing it, Holsey, who had sold to them, set off for Carolina; but that when it was completed, they refused to receive it, because it was defective as to title, and mentioned no consideration, and Bell and Rankin started home; that he remained and remonstrated with Hoy, but in vain. He then took the bond as prepared, overtook Bell and Rankin, but they still disapproved. He denies that writings were given evidencing the previous contracts, and he contends that the conveyance by Miller had no connection with the contract between Miller and Hoy.

We deem it unnecessary to repeat the circumstances which conduce to the result, but we can not doubt Hoy executed the bond for a conveyance in satisfaction of his previous obligation to Holsey, and that he would not have permitted Pugh to take it, but in trust for Rankin and Bell, as related to their portions of the land; and were it admitted that no writings previously passed, still the transaction assumed a valid shape in the execu-

tion of that instrument; and it seems to us equally clear that Miller made the deeds of conveyance in consummation of his contract with Hoy, and that between Hoy, Pugh and Bell. This conclusion is due to the moral character of the parties. Nor would the contrary avail them. Pugh was fully apprised of the equity of Bell's heirs; Hoy was bound to them; Miller to Hoy, and Pugh and Smith indemnified Miller against Hoy. The most obvious and ample justice is effectuated by the payment of the fifty dollars to Smith, with its interest, and a conveyance of the land by Pugh to Bell's heirs. But Pugh purchased from Smith. The price we cannot learn; yet would presume, as he knew the interest of Smith in the property only amounted to fifty dollars, he only paid him about that sum, and will sustain, from that cause, no essential injury, if he receives it. Touching the purchase from the complainants, it must suffice to say that, agreeably to the proof in the cause, they were all infants at the time of those transactions.

The lapse of time is relied upon by the appellants, in bar of this suit. The tranquillity and prosperity of society, justice itself, require that there should be a limit to the assertion of adverse titles. All well-regulated governments have made some provision on this subject, and our chancellor looks with disapprobation upon the stale demand. But it is expedient that the limitation be prescribed and certain. Discretion is too apt to be exercised in caprice. Our legislature has distinctly defined the period in which suits at law shall be commenced. These statutes do not, in terms, embrace suits in chancery; but sensible of the propriety of a rule, certain and uniform, the courts of chancery have long adopted, in relation to equitable rights, the legislative sense as avowed in limiting actions upon legal rights. Difficulties, however, were for a while experienced in controversies relative to real estate, and in consequence of a much longer period being allowed for the prosecution of some suits at law than others, for that kind of property. They have, however, as we understand, resolved in England, and in this country too, upon the shortest; perhaps with propriety. All limitation is predicated upon the supposed satisfaction of the demand, or the extinguishment of the right, and the loss of the testimony by which it may be proved; and the law has required greater solemnity and authenticity in such evidences as are chiefly used in real actions, and adopted better means for their preservation than in those which are necessary to establish equities. The rule, however, is at present well settled, that

equitable rights must, in the general, be asserted within twenty years.

We do not decide whether to give effect to this limitation there must be an actual adverse possession or not, nor is it necessary. Bell died in full possession, in the year 1791 or 1792; his widow and children continued upon it, evidently in virtue of the title derived from him, until 1800, when Miller conveyed to Pugh. Suppose there had been no infancy, and that the limitation commenced with that deed, still twenty years had not run when this suit was instituted. Time, therefore, proves no bar, and we consider the complainant entitled to the land. The questions then occur touching the rents and improvements. It is contended that the widow is entitled to dower in the land, and that this right passed to Pugh by the sale of her husband, Smith. The claim of dower we deem of the highest consideration with the chancellor; and we are apprised of cases in which it has been held that where the husband acquired a clear equity by contract for purchase and payment of the price, the widow was entitled to dowry. But the right of Bell was not perfect in equity. Miller had not been paid the whole of the price. We can not, therefore, concur in the recognition of the widow's right to dowry.

It seems, from the commissioner's report, that when Pugh obtained possession there were about fifteen acres of this land in cultivation; whether opened altogether by Bell, or in part by Smith, we can not ascertain; and that Pugh from time to time extended the improvements in all, as cleared by him, to seventy acres. The commissioners report against him a full rent for many years, referring back, as we suppose, to the clearing. They gave him credit for the improvements; but he is in arrear upon the items of improvement and rents, many hundred dollars. Whoever in good faith improves the land of another, should be compensated for his money and his labor devoted to that object, when he shall be evicted: 4 Bibb, 199; Litt. S. C., 320; 3 Marsh. 177 [*Griffith v. Depew*, 13 Am. Dec. 141]; 4 Litt. 346. In this there can be no hardship, because he is thus much enriched. It is true that in law the improvements are all in him who holds the legal title; yet in equity and in conscience, the improvements are of him who made them. But the present case is not precisely of this kind; for Pugh had notice of the prior equity of the complainant, and may not have improved in good faith; and this distinction would be of important consideration if he were complainant. It might then

be said, with some propriety, that the chancellor should not extend his aid to the trespasser. But the complainants ask the interposition of this court, and to obtain it they must do equity. The improvements are imputable to no merit in them. They cost the defendant all the expense and labor, as if made with the utmost purity of motive, and his loss will be the same if he shall not now be compensated for them. In conscience he should be paid. Even in *Green v. Biddle*, 8 Wheat. 1, the supreme court says that at law, in an action of trespass for meane profits, improvements may be allowed, not exceeding the profits.

And it would seem almost to follow that if the improvements may in equity be viewed as the property of the tenant he should not be answerable for rent upon them, until he has been paid their value. This is not exactly like the case of an employer and his laborer, where an action may at any time be brought for compensation. There is no privity, no contract, express or implied, the tenant can maintain no suit at law, and his right in chancery only becomes perfect when the holder of the better title shall assert it. All the improvements which he may make are at his own peril. He builds fences and houses, and they decay with time, or are destroyed by lightning. The loss must be borne by the occupant; for, when the commissioners come, they only value what they see, and in its present condition, however impaired. To compel the holder of the better title to pay the prime cost of improvements essentially decayed or entirely demolished, is to outrage the maxim upon which the whole process is founded; none shall be enriched by the loss of another. The successful claimant must pay to the tenant the value of his improvements on the land when regained; for thus much he is enriched and no more. Nor can there be, with propriety, any computation of interest in favor of the tenant, previous to the recovery; for all the objections to the assessment of improvements destroyed or impaired, at cost, apply equally to the calculation of interest. It is inconvenient, and even absurd, for other reasons, and we are able to find no precedent for it. In the increased comforts and profits during his occupancy the tenant finds his only indemnity for deterioration of improvements, and these, we think, he should enjoy.

In relation to the period when the computation of rent shall commence, some diversity is to be found in the books. We, however, understand the rule to be, in general, that the *bona fide* occupant shall account only from the time of filing the bill;

but the *mala fide* possessor, from the time he entered, giving full effect to the statute of limitations, which, we have said, applies by adoption to chancery proceedings. The infants had all attained full age more than five years before the commencement of this suit. But beyond that period, the rents cannot extend; for that would be the limit at law, in a suit for mesne profits: 1 Madd. 74. We are therefore of opinion that Pugh is chargeable for rents upon the property as received by Smith, to be computed back five years from the commencement of the suit, and entitled to compensation for all lasting and valuable improvements made by Smith or himself upon the premises, in the condition in which the commissioners may find them. The other items seem to be correctly settled.

Touching the petition to open the decree, to take recently discovered testimony, to prove the ages of children raised chiefly in the neighborhood of the defendants, we can only say that it was correctly overruled. We forbear to say anything of the order of the revival, and the appointment of guardians to defend for infants, if there were any. These will doubtless command the attention of counsel, when the cause shall return to the circuit court.

Decree reversed, with costs, cause remanded, commissioners to be appointed to assess rents and improvements, and further proceedings in conformity with this opinion.

LIMITATIONS IN EQUITY.—See *Frame v. Kenny*, 12 Am. Dec. 367, and note; and *Allen v. Beah*, 13 Id. 203.

IMPROVEMENTS, COMPENSATION FOR.—See the note to *Jackson v. Loomis*, *post*.

SANDERS'S HEIRS v. RUDDLE.

[2 T. B. MONROE, 139.]

SENDING AN EXECUTION TO ANOTHER COUNTY than that in which judgment is recovered, in cases not provided for by statute, is an erroneous proceeding.

A SALE UNDER AN EXECUTION SO SENT to another county is voidable, but not void, its validity depending on the purchaser having or not having notice of the irregularity.

WHERE THE PLAINTIFF BECOMES A PURCHASER at such sale, having a reasonable opportunity to know of the irregularity, the sale is invalid, and will be quashed.

A PARTNER OF THE PLAINTIFF IN SUCH PURCHASE is affected with the latter's notice of the irregularity, and the consequences as to both are the same.

APPEAL from the circuit court. The opinion states the case.

Bibb, for the appellants.

Sharp, for the appellees.

By Court,* BARRY, C. J. The appellants, upon notice, moved to quash an execution, and set aside a sale had under it, for several causes assigned. The circuit court overruled the motion; the appellants excepted to the opinion of the court, and now seek to reverse the judgment. The principal question to be decided is, whether under the circumstances of the case the sale of land to the appellees is valid. The judgment was obtained in Pendleton, the appellants lived in Scott, and the execution was sent to Grant county, where the land was levied upon and sold, the appellees being the purchasers at the sheriff's sale.

In the case of *Mason v. Rogers*, 4 Litt. 375, it is decided, after much consideration, that a *feri facias* cannot be sent out of the county where the judgment is rendered, except in cases specially provided for by statute, as where the defendant removes himself or effects, or resides out of the county, and then it is to be directed to the county where the defendant or his goods are to be found. From the principle settled in this case, it would seem that the law did not authorize the sending of the execution to Grant county, and the proceedings under it are, of course, inoperative. But the effect of this on the purchasers is to be considered. In the case of *Cox v. Nelson*, 1 Monroe, 94, the authority of the case of *Mason v. Rogers*, is recognized as fixing the construction of the statute relative to the transmission of executions to other counties; but the distinction is taken between irregular and erroneous proceedings, and the issuing an execution improperly to another county, classed among the latter. A sale had under such an execution is decided to be voidable, but not void, and its validity is made to depend on the innocence of the purchaser, and his ignorance of the deviation complained of. There is much reason in this. Great mischiefs would result from a contrary doctrine. Purchasers would be subjected to inconvenience; sales of property on executions, out of the county, would become hazardous; a fair price would not be had; it would at once be injurious to the debtor, and detrimental to the creditor. The correct doctrine is, as laid down in the case cited, that the sheriff and purchasers have a right to presume that the execution has been

*The court sitting in this cause was a special court constituted by the consent of the parties, and consisting of BARRY, C. J., and DAVIDSON, J.

legally sent out of the county, and act accordingly; and if it should thereafter be found that it was sent improperly, the title sold under it ought not to be disturbed. Innocent purchasers and strangers to the executions are thus protected.

But the rule, we apprehend, is different where the purchaser is a party to the execution and has a knowledge of the deviation from the statute. What is the present case? The plaintiff in the execution, Ruddle, is a purchaser. The execution has issued on a judgment bond given him as an occupant for improvements on land, the title to which he had been litigating with the appellants. Ruddle lived only thirty miles from the appellants. Walker, Sanders, and John Thompson resided in Scott county, and owned large estates there, real and personal, either of their estates more than sufficient to satisfy the execution. Thompson was a man extensively known, having served in both branches of the legislature, and at one time been keeper of the penitentiary. From these facts, which are stated in the bill of exceptions, the presumption is irresistible that Ruddle must have known the residence and condition of the parties; that in sending the execution to Grant, he willfully deviated from the statute and cannot claim the protection due to an innocent purchaser. The partner of the plaintiff in the purchase will be affected by his knowledge and must stand or fall with him. Upon the whole, we are satisfied that injustice has been done to the appellants. It is unnecessary to notice other grounds relied on by the appellants.

The judgment of the circuit court must be reversed, with costs, the cause remanded with directions to quash the execution, and set aside the sale.

HALE v. AMES.

[2 T. B. MONROE, 143.]

PLAINTIFF PROCURING LEVY ON STRANGER'S PROPERTY.—A plaintiff in execution procuring a levy to be made on a stranger's goods is guilty of a conversion, whether he takes possession or not.

CONVERSION is any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of their possession.

ERROR to the circuit court. The opinion states the case.

Depew, for the plaintiff in error.

By Court, **DAVIDGE, J.** This was an action of trover and conversion by the plaintiff in error to recover for the conversion of

a number of hogs, which the defendant had caused to be sold under a distress warrant, as the property of a certain William F. Hansford. On the trial of the cause below, the defendant moved the court to instruct the jury as in case of a nonsuit, because he had not, at any time, such possession of the hogs as subjected him to an action of trover and conversion, and the court accordingly gave the instruction. The correctness of this decision is the only question for our determination. It is presented by a bill of exceptions taken to the opinion of the court below, in which the evidence is set forth.

It appears that the hogs, which were the subject of controversy, were the property of the plaintiff; that the defendant knew it and procured a distress warrant to be levied on them, and was active in procuring their sale, which he effected, and one Barnett became the purchaser. We conceive the evidence, as set forth in the bill of exceptions, conduced to prove that there was a conversion of the hogs, and consequently it should have been left to the jury. If the officer converted the hogs by the agency or procurement of the defendant, he, the defendant, was liable to the action; it was not necessary that he should have had the actual possession of them to render himself liable. We apprehend the law to be, that any actual wrongful exercise or assumption, by a person himself, or by another by his procurement, over the goods of the real owner, by which he is deprived of them, is a conversion for which the action of trover will lie: 2 Saund. 49; 1 Chit. on Plead. 153; 6 Madd. 112; 2 Phil. Law of Ev. 119, and the authorities there cited.

The judgment must be reversed, with costs, the cause remanded to the court below for new proceedings to be had not inconsistent with this opinion.

CONVERSION, WHAT IS.—“Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it is a conversion.” Cooley on Torts, 448. Mr. Abbott defines it to be “a wrong, consisting in dealing with the property of another as if it were one's own, without right.” Abbott's Law Dict. “Conversion.” Mr. Bigelow's definition is very similar to that given by Judge Cooley. He says, in his learned and instructive note to *Donald v. Suckling*, Bigelow's Lea. Cas. on Torts, 428: “It may be laid down, as a general principle, that the assertion of a title to, or an act of dominion over, personal property, inconsistent with the right of the owner, is a conversion.”

THE GIST OF CONVERSION IS THE OWNER'S DEPRIVATION of his rightful dominion or control over his property. It is not necessary that the wrongdoer should derive, or seek to derive, any benefit from it. Thus in *Bristol v. Dart*, 5 Am. Dec. 264, the conversion consisted simply in a denial by a revenue officer of the owner's right to remove his property from the place where he

had deposited them, coupled with a menace, and show of force to prevent the removal unless the owner would give security to take the goods to a place designated by the officer; and the court quoted with approval Mr. Gwillim's statement of the law of the subject in his edition of Bacon's Abridgment, 6 Bac. Ab. 677: "It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another's use."

The owner's loss, and not the wrong-doer's gain is the point chiefly regarded. It is the interference with the owner's prerogative of doing what he will with his own, that constitutes the chief element in the wrong. Wherever there is an "assuming to dispose of the property of another, or the least intermeddling with it, in a manner subversive of the dominion which the owner has over it," there is "sufficient evidence of a conversion:" *Reid v. Colcock*, 9 Am. Dec. 732. Or, properly speaking, such wrongful assumption of dominion or authority is itself a conversion, and not merely evidence of it: *Hare v. Pearson*, 4 Ired. 76.

In discussing this subject in *Fouldes v. Willoughby*, 8 Mees. & Wels., Alderson B. says: "Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times, and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times, and in all places, I am entitled to make of it, and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether." Hence, as was held in that case, if the owner's right is recognized and submitted to, there is no conversion.

SOME ACT NECESSARY.—Although no actual manual taking is necessary to constitute a conversion, as held in the principal case, and in *Bristol v. Burt*, 5 Am. Dec. 264; *Reynolds v. Shuler*, 5 Cow. 326, and *Connah v. Hale*, 23 Wend. 462; there must be some active interference with the owner's dominion or right of property in the thing; mere nonfeasance will not do: *Bowlin v. Nye*, 10 Cush. 416. Thus, a negligent loss of goods by a carrier is not a conversion: *Id.*; but it is otherwise if he deliver them to the wrong person: *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Hawkins v. Hoffman*, 6 Hill. 586; *Clafin v. Boston etc. R. R. Co.* 7 Allen, 341. So in *Simmons v. Lillystone*, 8 Exch. 431, certain pieces of timber imbedded in the soil had been cut in two, simply because it was claimed that they were an obstruction to the free use of the land, but without any intention to deprive the owner of them, and the water afterwards rose and carried them away, and this was held no conversion. In delivering his opinion, Parke, B., said: "In order to constitute a conversion, there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff, and depriving him of it, although the defendant might not be considered as appropriating it to his own use. In this case nothing is done but cutting the timber, and, by accident, it is washed away by the river, not purposely thrown by the defendants to be washed away; consequently, we think that does not amount to a conversion."

ILLUSTRATIONS OF CONVERSION.—Conversion of a chattel may happen in various ways; as by selling it without authority; for the right of selling is one of the chief attributes of ownership: *Clark v. Whitaker*, 19 Conn. 319; *Harris v. Saunders*, reported in a note to *Jaggers v. Estes*, 2 Strobb. Eq. 370; *Webber v. Davis*, 44 Me. 147; *Gilman v. Hill*, 36 N. H. 311. Thus, where a sheriff sells property wrongfully: *Cooper v. Chitty*, 1 Burr. 20; *Tomkins v. Haile*, 3 Wend. 406; *Granger v. Hill*, 4 Bing. N. C. 221. So if he sells more than is required, it is a conversion as to the excess: *Stead v. Gascoigne*, 8 Taun. 527; *Batchelor v. Vyse*, 4 Moore & S. 532; *Aldred v. Constable*, 6 Q. B. (Ad. & El. N. S.) 370. So where a tax collector makes an unauthorized sale: *Pickering v. Coleman*, 12 N. H. 148; *Thompson v. Currier*, 24 Id. 237. So where a mortgagor sells in exclusion of the mortgagee's right: *White v. Phelps*, 12 N. H. 382. So where a mere bailee sells the thing bailed: *Buckmaster v. Mower*, 21 Vt. 404; *Crocker v. Gullifer*, 44 Me. 491; and see cases cited in the note to *De Tollenere v. Fuller*, 12 Am. Dec. 621, 622. So, generally, where one having only a limited interest in goods makes an absolute sale of them: *Coffey v. Wilkerson*, 1 Met. (Ky.) 101; *Whipple v. Gilpatrick*, 19 Me. 427; *Burbank v. Crooker*, 7 Gray, 158; but see *Donald v. Suckling*, L. R. 1 Q. B. 585; S. C., Bigelow's Lea. Cas. on Torts, 394; and Mr. Bigelow's note thereto. And where property is thus wrongfully sold, the purchaser will also be held guilty of conversion if he refuses to return it on the demand of the owner, or if he sells it again: *Hyde v. Noble*, 13 N. H. 494; *Clark v. Rideout*, 39 Id. 238; *Clark v. Wilson*, 103 Mass. 219; *Carter v. Kingman*, Id. 517; *Williams v. Merle*, 11 Wend. 80; *Everett v. Saltus*, 15 Id. 474; *Saltus v. Everett*, 20 Id. 267; *McCombie v. Davis*, 6 East, 540. So it has been held a conversion to sell part of a chattel, or of a mass of chattels, under such circumstances as to imply an assertion of a right to dispose of all: *Gentry v. Madden*, 3 Ark. 127; *Bowen v. Fenner*, 40 Barb. 383. So a misuser of a bailed chattel has frequently been held to be a conversion: *Hall v. Corcoran*, 107 Mass. 251; *Fisher v. Kyle*, 27 Mich. 454; *Horsely v. Branch*, 1 Humph. 199; but see on this subject the note to *De Tollenere v. Fuller*, 12 Am. Dec. 621. So a wrongful attachment of goods: *McPartland v. Read*, 11 Allen, 231; *Woodbury v. Long*, 8 Pick. 542. So taking goods from an officer's possession on a defective writ of replevin: *Adams v. McGlinchy*, 62 Me. 533. So an unauthorized taking of possession is generally evidence of a conversion: *Ireland v. Horseman*, 65 Mo. 511. So where one to whom a watch was entrusted by the owner's agent, delivered it to a watchmaker, in whose hands it was seized in execution for a debt of the agent: *Spencer v. Blackman*, 9 Wend. 167. So where a bailee of goods mortgages or pledges them for his own debt: *Stevens v. Eames*, 22 N. H. 568. So, generally, the mortgaging or pledging of goods without authority from the owner: *Thrall v. Lathrop*, 30 Vt. 307; *Carpenter v. Hale*, 8 Gray, 157. So where an agent sells in a manner not authorized: *Haas v. Damon*, 9 Iowa, 589. So where an agent to collect a note sells it: *Seago v. Pomeroy*, 46 Ga. 227; or where one pays away a note belonging to another upon his own debt: *Murray v. Burling*, 10 Johns. 172. It has been held, also, that where one drew part of the liquor out of a cask, and filled the cask with water, it amounted to a conversion of the entire contents of the cask: *Richardson v. Atkinson*, 1 Str. 576; see *Philpott v. Kelly*, 3 Ad. & El. 106.

These cases are, perhaps, sufficient to illustrate what is meant by a conversion, which is all that is here intended. The subject is exhaustively discussed in the learned note, before mentioned, to *Donald v. Suckling*, Bigelow's Lea. Cas. on Torts, 420.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

MARTIN v. REEVES.

[3 MARTIN, N. S. 22.]

FRAUDULENT SALE—EVIDENCE OF.—The acts and declarations of a vendor, after a sale, though not in the presence of the vendee, are admissible in evidence to show fraud in the former, but not to show fraud in the latter.

APPEAL from the court of the fifth district. The opinion states the case.

Baker and Davis, for the plaintiff.

Brownson and Lessassier, for the defendants.

By Court, MARTIN, J. The plaintiff sets forth that the defendant, Reeves, purchased at the sale made by the defendant, Villejoin, sheriff of the parish, on four executions against James Martin, a tract of land, which the plaintiff had before purchased from said James for a valuable consideration, by a notarial act duly recorded; he prays that the sale may be rescinded and that he may be quieted in his possession. The defendants severed in their pleas, but both alleged that the sale from James Martin to the plaintiff is a fraudulent one, made to defraud the said James's creditors, and therefore void. The district court, considering it so, gave judgment for the defendants, and the plaintiff appealed. Exception was taken to the admission of the acts and declarations of the plaintiff's vendors out of the plaintiff's presence.

We think the court did not err. There can not be fraud in the vendee unless there be fraud in the vendor. The defendants have, therefore, to establish the fraud of the latter. For

this purpose they gave evidence of the conduct and declarations of the latter after the sale to the plaintiff, his continued possession and contrast of the premises, his hiring and selling part of the property conveyed to the plaintiff in the same deed with the premises, his acting and holding himself out as the real owner of the premises. Fraud is seldom established by direct evidence. The proof of it, in most cases, results from numerous grave and concordant presumptions; for this purpose the conduct of one of the parties and his declarations are part *rerum gestarum*, all proper evidence to establish fraud in him. They are not, however, evidence of fraud in the vendee; and if there be no other evidence, the fraud of the latter is totally destitute of proof. It is in this sense that what fell from the court in the case of *Highlander v. Fluke*, 5 Mart. 442, is to be understood. On the same principle the existence of creditors to be defrauded may, and in many cases must, be established by the admission of the vendor, or by judgments obtained against him, which are *prima facie*, though not conclusive evidence against the vendee, who was not a party thereto. After, by such means, the fraud of the vendor is established, the party seeking relief has yet to establish that of the vendee, his participation in that of the former; for this purpose the evidence excepted to can not avail.

On the merits, we are enabled to conclude the district judge erred. A great number of witnesses were examined on both sides. If, in questions of fact, we generally regard much the conclusion of the first judge, because he had a better knowledge of the character of the parties and witnesses, heard and saw the latter, it is still safer for us to rely on his conclusions in cases of fraud where direct evidence is seldom produced and the truth is to be elicited by a comparison of the weight which is due to the evidence of the several witnesses often contradicting each other.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

On the admissibility of the declarations of the vendor in the absence of the vendee, see notes to *French v. Barrett*, 6 Am. Dec. 244; to *Reichart v. Castator*, Id. 406; and to *Dorsey v. Dorsey*, Id. 509.

MILLER v. MERCIER.

[3 MARTIN, N. S. 236.]

REPEAL, BY ENACTING A CODE.—Re-enacting into a code the general provisions of prior laws does not repeal the exceptions to which these general provisions were subject.

APPEAL from the court of the first district. The opinion states the case.

Lockett, for the plaintiffs.

Derbigny, for the defendants.

By Court, PORTER, J. This is an action against a third possessor of property, on which the plaintiffs aver they have a lien or privilege. The defendants insist that the plaintiffs can not recover until they show a judgment against their principal debtor; they also plead prescription and other pleas. This case has been already heard, and an opinion was given by this court at last May term. A rehearing was granted, and the parties have been again heard on the points on which the defendant required a re-examination.

The principal ground on which a change of the former judgment of the court has been insisted on is, that no judgment has been shown against the principal debtor, and that the debt has not been established. To this the plaintiffs reply, that it is impossible for them to procure a judgment against their debtor, because he has become insolvent, and that the existence of the debt is shown by their being placed on the bilan of the bankrupt, and by an admission of the defendants on record; that the items mentioned in the account were furnished by the plaintiffs to Hart, the insolvent debtor; that they were incorporated in the cotton press, of which the defendants have become the purchasers.

We have held, in a variety of cases, that the re-enacting in the civil code of the general provisions found in the ancient laws of this country, did not repeal the exceptions with which the general rule was limited, and in the opinion lately delivered in the case of *Herman v. Sprigg*, 3 Mart. N. S. 205, we have again gone into the reasons on which that rule has been established in this court. An application of this doctrine has been made to the subject now under consideration, in the case of *Nathan v. Lee*, 2 Mart. N. S. 32, and we are now unable to distinguish on principle that case from this, for there is the same exception in the Spanish law to the necessity of a judgment in case of insolvency,

that there is where the deed of mortgage contains the fact of *non alienando*: Cur. Phil. 2; Tercero Poseedor, No. 13. The existence of the debt, it appears to us, is sufficiently established by the declaration of the debtor in his bilan, taken with the confession of the defendants on record.

We have been pressed to remand the cause, because the decision of the judge, dismissing the case for want of the plaintiffs showing a judgment against the principal debtor, prevented the defendant from introducing evidence to show that the claim sued on was unfounded. So far as the record gives information on that point, and to it alone must we look when the parties do not agree in their statements, the judgment appears to have been rendered after the evidence was gone through. We, therefore, are unable to discover any legal ground on which we can remand the cause.

The former judgment of the court does not require any alteration.

WHAT EFFECT RE-ENACTING THE GENERAL PROVISIONS OF A STATUTE HAS UPON THE EXCEPTIONS TO SUCH GENERAL PROVISIONS.—The doctrine laid down in this case has been uniformly accepted and approved in Louisiana. In *Valeain v. Cloutier*, 3 La. 177, the court say: "The question then recurs, does the re-enactment in our code of a general provision existing in the Spanish law, repeal the exception which accompanied it in that law. We have so repeatedly decided the contrary, and the jurisprudence of the court is so fixed in this matter that it is unnecessary to refer to cases in which the principle has been settled." The court held, in *Herman v. Sprigg*, 3 Mart. N. S. 199, that "the re-enactment of a general provision contained in a former law, to which an exception was attached, does not repeal that exception; because the intention to repeal is never presumed, and both provisions may well stand together." The doctrine of these cases is fully sustained by the following decisions: *Nathan v. Lee*, 2 Mart. N. S. 32; *Duncan v. Hampton*, 6 Id.; *Verret v. Theriot*, 15 La. 110; *Le Blanc v. Landry*, 7 Mart. N. S. 668; *Urquhart v. Sargent*, 2 La. An. 201; *McCarty v. Steam Cotton Press Co.*, 5 La. 21.

BRENT v. ERVIN.

[3 MARTIN, N. S. 303.]

LOST NOTE.—An action on a lost note may be maintained without tendering the defendant any indemnity, if it appears that the note in the hands of any indorsee would be subject to all equities existing in favor of the maker.

APPEAL from the court of the fourth district. The opinion states the case.

Watts and Lobdell, for the plaintiff.

Grymes, for the defendant.

By Court, MARTIN, J. The plaintiff claims, as indorsee, payment of the defendant's note, which it is alleged was protested at maturity, and afterwards purloined from the plaintiff's possession. He had judgment on the plea of the general issue, and the defendant appealed. On the trial the plaintiff offered in evidence his own affidavit of the manner in which the note was purloined or lost, his advertisements for recovery of it, and evidence of his conversation with a person near him, at the time of this alleged purloining or loss. These documents were received, notwithstanding the defendant's objections, and he took bills of exceptions. As the case may well be disposed of, we have thought it proper to reserve the consideration of the admissibility of the evidence objected to for a case in which the consideration may be necessary. The written evidence not objected to consists of a copy of the note and protest, and three letters of the defendant, who admitted his signatures thereto. The note copied on the back of the protest is a copy of that which is annexed to the petition, and the protest states that the defendant, on the original being exhibited to him by the officer, on the day of payment, answered, he would not pay said note.

The defendant's letters, the first of which bears date a few weeks after the protest, contain offers to settle the plaintiff's demand for three thousand two hundred and fifty dollars, the exact amount of the note sued on, by giving other notes, or an acceptance at twelve months in New Orleans; and in the latter, the defendant announces the approach of Robertson, his son-in-law, charged with the explanation of his intention to the defendant.

The parol evidence consists of the testimony of the officer who protested the note, who declares the copy of it and of the protest annexed to the petition, is a true one; that he delivered the original to the plaintiff after the protest; that he knew the signatures of the defendant, at the foot of the note, and that of the payee and plaintiff's indorser on the back.

The testimony of Robertson, the bearer of the last letter of the defendant to the plaintiff, shows that the proposition made by the latter, was to give him the acceptance of a mercantile house in New Orleans, at twelve months, on his giving security, and the use of four negroes during one year. We think the defendant, by suffering the above documents and testimony to be admitted, has relieved the plaintiff from the difficulty he would have been in, had any evidence, written or oral, of the contents of the note, been resisted, till its absence from the plaintiff's hands was accounted for: 1 Vol. 446; 5 Mart. 492.

It is not alleged that the note, or any part of it, was paid. The only points at issue are whether the defendant made the note sued on, and whether it was indorsed to the plaintiff by the payee. We think the production of the protest and copy, and the testimony of the officer who made the protest, establish these two facts. He swears he knows the signatures at the foot and back of the note; and we conclude that this is evidence not only of his knowledge or acquaintance with the handwriting, but also of his belief of its genuineness.

The defendant's own letters strongly corroborate the evidence resulting from these documents and testimony. He admits he owes the plaintiff the exact amount of the note, and offers to settle the same, if time and security are given, with the *douceur* of one year's labor of four negroes. Security is required; for what? The answer which the fact of the case suggests is, against the chance of the note being produced by a finder, or one to whom it might have been transferred. A *douceur*; for what? As a compensation for relieving the plaintiff from the difficulty in which the absence of the note from his hands placed him. These are the answers which the facts, as explained, naturally furnish. It appears that the note was returned by the officer to the plaintiff, after the protest; it is clear any person obtaining it afterwards received or found it burdened with the obligation of allowing any equitable plea, which might be opposed to it, in the hands of the present plaintiff; the district court did not err in refraining from requiring him to give security for the defendant's indemnification.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

REMEDIES ON LOST BONDS AND NOTES.—See on this subject the notes to *Edwards v. McKee*, 13 Am. Dec. 479, and *Bank of U. S. v. Sill*, Id. 47.

DEBUYS v. MOLLERE.

[3 MARTIN, N. S. 318.]

INDORSER, PROMISE AFTER PROTEST.—A promise by an indorser after protest, to pay the note, is a waiver of notice of protest, and is *prima facie* evidence that due notice was given.

APPEAL from the court of the second district. The opinion states the case.

Carleton and Lockett, for the plaintiff.

Nichols, for the defendant.

By Court, MATHEWS, J. In this suit, the plaintiff claims from the defendant three hundred and two dollars and eleven cents. The petition contains two counts; one on a negotiable note, charging the defendant as indorser, to the amount of one hundred and sixty dollars; the other on an account stated, amounting to one hundred and forty-two dollars and eleven cents. The cause was submitted to a jury, in the district court, who found for the plaintiff only on the latter count; and judgment being accordingly rendered, he appealed.

The declaration on the note is in the ordinary form, on which the plaintiff seems to have failed to prove actual notice duly given to the indorser, of the refusal of the maker of the note to pay; but he relies on a subsequent promise made by the defendant. The record contains three bills of exception; one in relation to the summoning of the jury. The question arising out of this exception has been already settled by a decision of this court favorably to the plaintiff's pretensions, and needs no further discussion.

Another to the admission of parol evidence to prove the subsequent promise on the existing pleadings of the cause; and a third, to an opinion of the judge *a quo* expressed to the jury. We are of opinion that there is no error in allowing the testimony to go to the jury, by which a promise by the indorser to pay, made subsequent to the protest, was proven. The judgment to be rendered in the case depends on his liability as such; and not exclusively on the subsequent promise. Whether the judge did or did not err in his charge to the jury, it is unnecessary to determine, because the whole cause is now fairly before this court, and final judgment may be rendered according to its merits. The evidence in the case shows that the defendant, subsequent to the protest of the note, agreed to secure to the plaintiff the amount specified in it by a mortgage on his property, which, for some cause or other, was not executed. This agreement is equivalent to a promise to pay; and it only remains to ascertain the legal effect of such a promise. The appellee must have known whether he was duly notified of the protest. If he were not, by promising to pay, he waived the advantage which such negligence would otherwise have given. But the promise itself is *prima facie* evidence of due notice; thus, if he did not receive regular notice, he is liable under his subsequent promise; and if such promise afford evidence of proper notice, he is then most clearly bound by his indorsement, because he never was in a situation to be dis-

charged from the liability which it created: See Chitty on Bills, Am. ed., 1821, 303, 304 and 305, and the authorities there referred to.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff and appellant do recover from the defendant and appellee the sum of three hundred and two dollars and eleven cents, with legal interest from the judicial demand, and costs in both courts.

See *Fotheringham v. Price*, 1 Am. Dec. 619, and note; *Fleming v. McClure*, 2 Id. 671; *Miller v. Hackley*, 4 Id. 372; *Grant v. Shaw*, 8 Id. 142; note to *Trimble v. Thorne*, 8 Id. 304; *Hall v. Freeman*, 10 Id. 621.

LACROIX v. MENARD.

[3 MARTIN, N. S. 339.]

INTERVENOR, JURY TRIAL.—An intervenor is entitled to a jury trial, though none is demanded by the plaintiff or defendant.

APPEAL from the court of the first district. The opinion states the case.

Denis, for the plaintiff.

Derbigny, for the defendant.

By Court, PORTER, J. The only question presented in this case is, whether a party who intervenes in a suit can demand that the facts at issue be tried by a jury. The petition of intervention in this case was filed on the thirteenth of November, and on the nineteenth the cause was called for trial. The judge refused to let it go to a jury, on the ground that neither the original plaintiff nor defendant had prayed for one.

It appears to us the court below erred. It is true the statute, in prescribing the mode in which the parties to a cause may have their case submitted to a jury, speaks only of the plaintiff and defendant; and an intervening party, technically speaking, is neither one nor the other. But it is not less true, that he either approves the pretensions of one or both of the parties litigating, and that considered in this light, he stands in the situation of a plaintiff; or at least he is an actor in the cause. But by whatever appellation he be designated, it appears to us a necessary consequence of admitting him as a

party, that he should have the same right in proving his case, in trying it, and in enforcing his judgment, as those who were originally plaintiffs and defendants. Were we doubtful on this point, the regard which we entertain for the trial by jury, and the high opinion we hold of its value in ascertaining facts, would induce us to support the citizen who claims its aid, and the investigation of his rights: 2 Martin's Dig. 144; 9 Mart. 381.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and is further ordered, adjudged and decreed, that this case be remanded to the court below, with instructions to the district judge to submit the case to a jury, as prayed for in the bill of intervention; and it is further ordered that the appellee pay the costs of the appeal.

WHO MAY BECOME INTERVENORS.—Any third person who has a direct interest involved in the matter in dispute, between the parties to a suit already commenced, may, by leave of the court, intervene in such suit, either as plaintiff or defendant, or in opposition to both, to protect such interest, and may claim a decree disposing of his rights: *Legg v. McNeill*, 2 Tex. 428; *Chandler v. Fulton*, 10 Id. 2; *Stich v. Goldner*, 38 Cal. 608; *Stoddard v. McMahan*, 35 Tex. 267; *Mussina v. Goldthwaite*, 34 Id. 125. The interest which will entitle a party to intervene, must be one directly involved in the pending suit: *Curraby v. Morgan*, 5 Mart. N. S. 500; *Pierre v. Masse*, 7 Id. 196; *Brown v. Saul*, 4 Id. 434; *Gasquet v. Johnson*, 1 La. 425. In the last case the court say: "This, we suppose, must be a direct interest by which the intervening party is to obtain immediate gain, or suffer loss by the judgment which may be rendered between the parties; otherwise, the strange anomaly would be introduced into our jurisprudence of suffering an accumulation of suits in all instances where doubts might be entertained, or enter into the imagination of subsequent plaintiffs, that a defendant, against whom a previous action was under prosecution, might not have property sufficient to discharge all his debts; for, as the first judgment obtained might give a preference to the person who should obtain it, all the subsequent suitors, down to the last, would have an indirect interest in defeating the action of the first. This, certainly, was not the intention of our legislators."

HOW PARTIES MAY BECOME INTERVENORS.—An *ex parte* order may be made allowing an intervention to be filed: *Spanagel v. Reay*, 47 Cal. 608. A petition to intervene is filed simply by leave of the court, and need not be verified by affidavit of the intervenor: *Smith v. Allen*, 28 Tex. 497.

RIGHTS OF INTERVENORS AS PARTIES TO THE SUIT.—They have a right to interpose a general demurrer or exception, going to the merits of the action: *Hanchett v. Gray*, 7 Tex. 552. Where the petition of intervention traverses the complaint of the plaintiff, he must prove his case, otherwise the intervenor is entitled to judgment: *Speyer v. Ihmela*, 21 Cal. 281. When the intervenor has filed his petition, and given notice to the other parties to the suit, he can claim the benefit of the original suit, and has the right to prosecute it to final judgment. Nor can the plaintiff, by dismissing or discontinuing the suit, deprive him of this right: *Field v. Gautier*, 8 Tex. 74;

Elliott v. Ivers, 6 Nev. 287; *Poehlmann v. Kennedy*, 48 Cal. 201. If an intervenor occupies the position of a defendant, he is allowed the same latitude that is granted to an original defendant, in pleading as many inconsistent pleas as he chooses, so long as they are pertinent and in due order of pleading: *Smith v. Sublett*, 28 Tex. 169. Interrogatories exhibited to the defendant by the plaintiff, and taken *pro confesso*, because he refused to answer them, can not be read in evidence against an intervenor in an issue solely between the latter and the plaintiff: *Garthwaite v. Hart*, 24 Tex. 314. After having gone to trial upon answers filed by the intervenors, without objection on the part of a party to the suit, it is too late for the latter to object to the right to intervene, for the first time in the supreme court: *Smith v. Penny*, 44 Cal. 161. But intervenors are not allowed to plead exceptions having for their object the dismissal of the action: *West v. His Creditors*, 8 Rob. (La.) 123; *Lee v. Bradlee*, 8 Mart. O. S. 55; *Yeatman v. Estill*, 3 La. An. 222; *Clamageran v. Bucks*, 4 Mart. N. S. 487. In the case last named, the court say: "We are also of opinion that an intervening creditor can not plead peremptory exceptions, the only object of which is to have the cause dismissed for irregularities in the proceedings. These were matters for the consideration of the defendants, or those who represented them, and if they thought fit to waive a defense which should not be used in a just action, no other party can. It is exercising rights which do not belong to him, and which no law that we are acquainted with confers." So too, "an intervening party has no right to take advantage of the insufficiency of the oath or bond on which process of attachment issues:" *Valsain v. Cloutier*, 3 Mart. O. S. 170; *Emerson v. Foz*, 3 La. 178. Nor will parties be allowed to intervene, when permitting them to do so would retard the principal suit so as to operate injustice to others: *Eccles v. Hill*, 13 Tex. 65; *Smalley v. Taylor*, 33 Id. 668. Nor will they be allowed to intervene after a suit has been settled, and the judgment to be entered agreed upon by the original parties: *Henry v. Cass Co., M. & E. Co.*, 42 Iowa, 33.

MELLON v. CROGHAN.

[3 MARTIN, N. S. 423.]

DEMAND, AT A PARTICULAR PLACE.—If a note be made payable at a particular place, a demand at that place must be made to authorize a recovery against either maker or indorser.

APPEAL from the court of the first district. The opinion states the case.

Lockett, for the plaintiff.

Pierce, for the defendant.

By Court, PORTER, J. The petition in this case sets out, that the defendant is justly indebted to the plaintiff in the sum of six hundred and eighty-six dollars and fifteen cents, the amount of a promissory note, drawn and subscribed by said defendant in favor of the petitioner, dated New Orleans, January 1, 1823, payable twelve months after date, as will appear from a copy

annexed, and made a part of the petition, the amount whereof the said Croghan neglected to pay when amicably demanded.

The note annexed corresponds with that set out, except in being made payable in the Louisiana state bank. The defendant admits the facts alleged in the petition, but denies they establish any liability on his part to pay the note sued on. The judge below was of opinion, that a demand at the place specified in the note was a condition precedent to the plaintiff's right to recover, and gave judgment for the defendant. The former appealed. The case has been submitted without argument.

This is a most controverted question, and hardly any subject has been presented to us on which a greater weight of authority is found arrayed for and against the principle which the judge *a quo* decided the cause. The following are cases to show that if the place of payment be embodied in the note, a presentment at the place must be averred and shown, to charge the maker: 14 East, 500; Starkie's N. P. 468; 16 East, 110; 5 Taunton, 30; Id. 344; 3 Mau. & Sel. 150; 4 Id. 462.

It has, however, been decided in the cases hereafter quoted, that a demand at the place specified in the instrument is not necessary to charge the maker: 2 Campb. 498; 4 Mau. & Sel. 150; 8 Johnson's Cases, 71; 6 Mass. 524; 8 Id. 480; 13 Id. 566; 17 Johns. 248.

The difference in opinion to be discovered in these cases appears to be principally confined to the courts of England. In our sister states the preponderance of authority seems greatly in favor of the position, that a demand at a particular place is not necessary. There has been a case lately decided in the house of lords in England, where the law on this subject received a very full examination. The very point now before the court was much discussed, though the question presented for decision was not the same. It arose there between the indorsee and acceptor of a bill of exchange. As all the judges delivered their opinions, the case would be one entitled to great respect as evidence of the commercial law, were it not for the extraordinary diversity of sentiment which it exhibits. Indeed, there are scarcely two that agree on all the points submitted to their consideration.

It is stated by several of these learned persons, that, if a promissory note be made payable at a particular place, a demand at that place is a condition precedent to recovery against the maker; but that it is not absolutely necessary it should be made on the very day on which it falls due, the time only being

of importance when the indorser is to be charged: 2 Brod. and B. 165.

The judges who contest the necessity of making a demand at the place specified, and who hold that the making of a note renders the maker universally liable, in answer to this argument, declare that they are unable to distinguish between place and time. That if the former be required, so must the latter, and hence they conclude, the holder would lose his right forever, if he did not demand payment on the very day the note fell due. The supreme court of New York, which establishes a different rule, seem also to think that such would be the inevitable consequence of recognizing the doctrine, that a demand at the place is a condition precedent to the right of recovery: 18 Johns. 246.

If this consequence were to follow the requiring a demand at the place specified, it would furnish a strong argument against adopting the rule; but we are unable to discover any ground for this apprehension, and we think the distinction on this head clear between the obligation of the indorser and the maker. By the law-merchant the contract of the former is not absolute, but conditional. He becomes responsible only on default of the maker to pay, and due notice being given of that default. His engagement is *stricti juris*, and so anomalous that it will neither furnish analogy for ascertaining rights under other contracts, nor be elucidated by reference to legal obligations flowing from them. It is entirely the creature of commercial usage, and was introduced for the ease and convenience of trade, it being considered or supposed that it was of great importance to the facility of its operations, that the indorser should have immediate notice of his liability. By a parity of reasoning it has been held by some, he is discharged if demand of the maker be made at any other place than that specified in the instrument. That question is not presented for decision here, therefore it is improper it should be now settled; but, admitting he is, what analogy does his case present, by which the obligations of the maker can be ascertained? He, instead of coming under a conditional obligation, makes, by the very terms of the instrument, an unqualified promise to pay the payee, or whomsoever he may direct. His obligations are entirely distinct from those created by the law-merchant. They would be the same if that law were stricken from our code of jurisprudence, and, in testing the extent of his liability, under the promise contained in the note signed by him, we do not see how it can be distinguished from an obligation which did not contain words that made it nego-

liable. Indeed, those who maintain this doctrine do not place it on the ground that it flows from any of the rules peculiar to negotiable paper. But it appears to us that those who contend for such a rule overlook or confound two things entirely distinct, the substance of the contract, and the mode by which it is to be discharged. To those acquainted with the doctrines of our jurisprudence, nothing can be more familiar than the distinction between those things which are of the essence of the contract, and those which are accidental to it. Among the latter, says Pothier, are the liberty of paying by installments, the allowing a certain time for the payment of money and the like. On this principle, the Roman jurists considered that the specification of a particular place for payment was supposed to be made for the advantage of the creditor, as well as the debtor, and, therefore, the latter could not compel the former to receive it elsewhere; but the creditor might demand payment at any other place, making compensation to the debtor for any damage he might sustain by the change, and could enforce the contract elsewhere by a suit under this condition: Dig. liv. 13, tit. 4, l. 1 and 9; Pothier on Obligations, No. 8.

The principal reasons on which the law has been lately settled in England, that a demand is necessary at the place appointed for payment, are: 1. That, according to their jurisprudence it is a condition precedent; and, 2. The serious inconvenience that would result from a different rule. The latter consideration appears to us entitled to great weight. It consists principally in this: That merchants who are traveling from place to place, cannot conveniently carry funds with them; that for ease and convenience they deposit their money at a banker's or merchant's, where they make all their acceptances or notes payable, and that it might expose them to loss, inconvenience, and, in some instances, the ruin of their credit, if demand of payment could be made of them elsewhere. As in the case of a merchant of New Orleans going on business to London, Paris or New York, who makes a note here before he sets out, payable at his domicile or his banker's. If demand be not necessary at the place designated, the bill might be sent after him, and he arrested in another country the moment it fell due. This reason loses somewhat of its weight, when the domicile of the obligor is in the same place where the bank is fixed, at which the note is made payable, and the personal demand is made at the residence of the maker; but some general rule must be followed, for the facility of commerce, and, we think, after mature

reflection, that it is safer to adopt that we have just stated. It imposes no hardship on the payee, for, if he choose, he may refuse an obligation in this way, and thus retain his right to demand payment whenever his debtor be found. It must be supposed such a clause is introduced for some purpose, and no other can be imagined than that it is at the place designated, the obligor will have funds to meet his obligation, and there the obligee will seek them. A contrary rule would require the obligor to have funds at two places to meet his engagements. Deciding in this way is in conformity with the rules of our own law, which do not consider the debtor in fault (*en mora*) until demand is made at the place fixed for payment: *Curia Phil.*, lib. 2, cap. 7, paga. No. 20.

The judge below gave final judgment against the plaintiff; we think there should have been one of nonsuit. He ought to be permitted to yet make a demand at the bank, and, if not paid, to sue the defendant and recover the amount due.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that there be judgment against the plaintiff as in case of nonsuit, the appellee paying costs in this court, and the appellant those of the court below.

The principal question decided in this case has been much discussed by the courts, and their decisions have not been uniform, either in this country or in England. In *Eastman v. Fifield*, 14 Am. Dec. 371, the court, after discussing several English and American cases, reach the conclusion, "that when a note is made payable at a particular time and place, no demand is necessary." See note to *Eastman v. Fifield*, *supra*, and cases there cited.

WHITEHURST v. HICKEY.

[3 MARTIN, N. S. 589.]

NULLITY OF JUDGMENT.—The failure to give the reasons on which a judgment is founded is a relative nullity only.

SHERIFF'S BOND.—A parish judge's certificate, that a sheriff's bond has been executed with the concurrence of the justices, is evidence that the sureties were approved by them.

OFFICIAL BOND.—THE FAILURE TO RECORD an official bond does not invalidate it.

APPEAL from the court of the third district. The opinion states the case.

Watts and Lohdell, for the plaintiff.

Duncan, for the defendants.

By Court, MATHEWS, J. This is a suit brought against the curator of the estate of the late F. Ameburg, who was sheriff of the parish of East Baton Rouge, and against the sureties of the latter as sheriff aforesaid. The petitioner claims remuneration for the loss and damage occasioned by the negligence and misconduct of the sheriff in the execution of judicial process, wherein the interest of the former was concerned. Judgment was rendered in the court below against the curator, and in favor of the sureties, from which latter part of said judgment the plaintiff appealed.

The case has been held longer than usual under advisement by the court, in consequence of believing that it involved a very important question in relation to the jurisdiction of the district and probate courts of the state. The circumstance which led to this belief is the appearance of a bill of exceptions on the part of the curator to the judgment rendered after the verdict of a jury, to which the case had been submitted, on the ground of incompetence in the court. This is in truth an exception to a final judgment, which, as has been repeatedly decided, cannot regularly be taken. In examining the record more minutely, we discover that the curator is no party to this appeal, either as appellant or appellee, and, therefore, no notice can be taken of his interest in the cause. It is to be considered only in relation to the sureties who are appellees. In their answer to the petition, after pleading the general issue, they further allege that the sheriff's bond relied on by the plaintiff is illegal and void.

The case comes regularly before this court on several bills of exceptions taken to the opinions of the judge *a quo* given in the course of the trial below: 1. That by which he permitted the record of the suit carried on to judgment and issuing execution, wherein the sheriff is charged with negligence and misconduct, to be given in evidence to the jury. 2. To that by which he rejected the copy of a bond, proven to have been subscribed by the defendants as sureties for the sheriff. 3. To the opinion whereby he refused parol evidence to prove that the parish judge did assemble the justices as required by law to approve the security offered by said sheriff.

As to the first of these exceptions, we are of opinion that the judge did not err in admitting the record in evidence. The ground on which its admissibility was opposed, is alleged nullity in the judgment on account of no reason being adduced in its support. Admitting that such nullity exists, it is only relative, and can not be taken advantage of by the present defendants.

The opinion of the judge, as represented in the second bill of exceptions, we believe to be erroneous.

The truth and correctness of the copy of the bond offered in evidence, the real existence of the original at a former period, and its loss without fault of the plaintiff, or by a fortuitous event, were amply proven on the trial of the cause in the court below, as shown by the record; and the judge seems not to have rejected the evidence on account of any defect of proof in relation to the copy, but under an impression that the original itself was void and invalid, in consequence of defects in its execution. In testing this opinion, we are, therefore, compelled to enter into a discussion of the law which requires sheriffs to give bonds, and points out the manner in which they ought to be executed. The act of 1813 requires every sheriff in the state to give two bonds, one for the faithful discharge of his ministerial functions in the execution of judicial process, the other for collection of taxes. Both are ordered to be recorded in the offices of the clerks of the parish courts: 1 Mart. Dig. 696.

The bond now under consideration is alleged to have no binding force on the persons who have subscribed as sureties, as being defective in its execution, and void because not recorded, etc. The act above cited directs how sheriffs' bonds are to be executed, and the security offered approved: 1 Mart. 698, art. 8. The parish judge is bound to convene a court, as it is termed, to consist of himself and a majority of the justices of the peace of the parish, who are required to judge of the sufficiency of the sureties offered, and to approve or reject as, in their opinion, propriety and the general interests may dictate. This court is not by the law compelled to reduce to writing, or to make out any *proces verbal* of their proceedings. The justices of the peace appear to be called in aid of the parish judge, to assist in judging of the sufficiency or insufficiency of the security to be offered by the sheriff; but are not required to sign the bond if accepted by the court. A bond shown to have been rejected, would not be binding on the subscribers; the want of the justices' names to the instrument is, however, no evidence that the sureties have been adjudged insufficient and the bond rejected. A certificate of the parish judge, showing that bonds thus taken have been executed with the concurrence of the justices of the peace, ought to be good evidence of approval of the sureties, and consequent validity of their obligations. The copy offered in evidence in the present case, purporting the original was signed, sealed and delivered in the presence of the

parish judge and justices of the peace, who approved the security given by the sheriff, is sufficient, having the signature of the judge.

We are, therefore, of opinion that it is good and valid according to the strictest forms of law. It now only remains to consider whether this validity is affected by the want of recording, in relation to the obligors. All the solemnities required in the execution and recording of these bonds are instituted solely for the benefit of the obligees, viz: the public. A failure to comply with them may lessen public security, but certainly ought not to be so construed as to exonerate sureties from obligations voluntarily contracted. It has been already decided by this court that promisors must remain bound in the manner which they may have thought fit to bind themselves, if the contract be not illegal.

In relation to the lost bill of exceptions we are inclined to think that oral testimony might have been properly received in corroboration of the fact declared by the parish judge in executing the bond, that the justices of the peace present approved that which was done. But if the solemn declaration of the judge in the instrument itself, be sufficient to establish its legal execution, additional testimony would be useless.

According to this view of the case the judgment of the district court must be reversed, and as the cause was tried before a jury, and legal testimony rejected, it appears to this court to be most consistent with its uniform practice to send it back for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, so far as it relates to the appellees, be avoided, reversed and annulled, and that the cause be remanded to the said court to be tried *de novo* between the parties to this appeal, with instruction to admit in evidence the copy of the bond, etc; and it is further ordered that said appellees pay the costs of appeal.

INFORMALITIES WHICH DO NOT INVALIDATE OFFICIAL BONDS.—“The tendency of the legislation and the decisions of the courts of the different states, is to hold the obligors upon official bonds, liable as upon statutory undertakings, and to disregard objections purely technical in their character. These bonds are given for the benefit of the public against the frauds and speculations of persons in official positions, * * * and only upon the most cogent and satisfactory grounds should they be held invalid.” *The State v. Fredericks*, 8 Iowa, 553. It is held that although an official bond is not taken in the manner nor by the persons required by law to take it, yet it will be held good as a voluntary bond and bind the sureties: *The State v.*

McAlpin, 4 Ired. 140; *The State v. Perkins*, 10 Id. 333. The failure of the proper officers to approve an official bond, or its approval by a different person from the one whose duty it is to approve it, will not invalidate it nor release the sureties from their liability: *Green v. Wardwell*, 17 Ill. 278; *Marshall v. Hamilton*, 41 Miss. 229; *Jones v. The State*, 7 Mo. 81; *People v. John*, 22 Mich. 461; *People v. Edwards*, 9 Cal. 286; *Mendocino Co. v. Morris*, 32 Id. 145. In the last case, the court say: "The liability of the sureties does not depend upon the approval of the bond by the proper officers." And in the case of *The People v. Edwards*, Field, J., says: "The object of requiring the approval is to insure greater security to the public, and it does not lie in the defendants to object that their bond was accepted without proper examination into its sufficiency by the officers of the law."

So the fact that an official bond was not signed and acknowledged in the presence of a particular officer, as required by law, does not affect its validity. "It was not for the benefit of the surety that he was required in person to acknowledge the bond before the commissioners, but it was to prevent him from afterwards making any question concerning the genuineness or the validity of the instrument as against him:" *The State v. Blair*, 32 Ind. 313. Although the bond is given several months before it is required by statute to be given, it is nevertheless valid: *Moore v. The State*, 9 Mo. 330. And it is equally so though not given until after the expiration of the time prescribed by the statute: *The State v. Rhoades*, 6 Nev. 352; *Monteith v. Commonwealth*, 15 Gratt. 172; *State v. Cooper*, 53 Miss. 615. The validity of the bond will not be affected by the fact that the officer by whom it was given did not take the oath of office: *Bonta v. Mercer Co. Ct.*, 7 Bush, 576; *Marshall v. Hamilton*, 41 Miss. 229. Nor by the failure to affix to it a United States revenue stamp: *The State v. Garton*, 32 Ind. 1. An official bond whose condition is not strictly in the form required by the statute is nevertheless binding, if it is in substantial accordance with such requirements: *Probate Court v. Strong*, 27 Vt. 202; *Place v. Taylor*, 22 Ohio St. 317.

A surety who signs the bond while there are blanks in it for other sureties, and delivers it in that condition to the principal obligor who fills up the blanks, will be held liable: *The State v. Pepper*, 31 Ind. 76; *Webb v. Baird*, 27 Id. 368; *Wright v. Harris*, 31 Iowa, 272. And a bond given by a public officer, though not good as a statutory bond, may be recovered on as a voluntary obligation: *Goodrum v. Carroll*, 2 Humph. 490. In *Skellinger v. Yendes*, 12 Wend. 306, *Savage, C. J.*, says: "The statute declares that the bond shall be filed within ten days after the election, and before the constable enters upon the duties of his office; yet, the bond has been held good, though not filed within the ten days, and it can not be doubted that the constable himself would be responsible for any act done by him before filing the bond. The statute being directory to the officer himself, he can not take advantage of his own omission; nor is there any reason why the sureties should not be liable, notwithstanding the want of a compliance with the statutory provision; in this case it seems that the town clerk neglected to indorse his approval of the sureties. That provision was intended for the benefit of those who should put executions into the hands of the constable, and has no connection with the liability of the sureties; their signature was all that was necessary to make them liable. If the bond was not approved and filed, the omission might be considered a refusal to serve, and the vacancy might be filled; but there is nothing in the language or the policy of the statute which renders void any such instrument executed for the security of the execution-creditors. It is also objected that the instrument executed by the defendants was not sealed

nor in the form contained in the statute. To this objection I give the same answer as above; it is sufficient that the substance is there. The substance of the instrument required by the statute is, that the constable and his sureties shall be responsible for all such sums as the constable shall become liable to pay, by reason of any execution delivered to him for collection. The instrument executed in this case contains unnecessary recitals; they do no harm and are mere surplusage."

MARIGNY v. REMY.

[3 MARTIN, N. S. 807.]

CONTRACT, WHO MAY SUE ON.—One may maintain an action on a stipulation in his favor, to which he is not a party.

APPEAL from the court of the first district. The opinion states the case.

Dumoulin, for the plaintiff.

Cannon, for the defendant.

By Court, MARTIN, J. The plaintiff states that the defendant having purchased from the plaintiff's intermediate vendee, two lots and a half of ground, engaged in the deed of sale, to pay the price to the plaintiff in lieu of his, the defendant's vendor, and afterwards sold the premises to Bureau. That neither the capital nor interest being paid, the plaintiff obtained judgment against Bureau, on which the premises were sold, and there remains due to the plaintiff on said judgment, four hundred and fifteen dollars and ninety-three cents, which he claims from the defendant, with damages and costs.

The defendant pleaded the general issue, and had a verdict and judgment. The plaintiff appealed. The allegations of the petition appeared proved by notarial acts, and the record of the suit against Bureau. It appears that the judge *a quo* charged the jury in favor of the defendant, stating the plaintiff had no cause of action; as the defendant in the bill of sale, he received from the plaintiff's immediate vendor, did not bind himself to the plaintiff, and, consequently, there was no privity of contract between the parties to the suit. The plaintiff's counsel excepted to this part of the judge's charge.

We are unable to see any difference in the facts of this case, and that of the *Mayor v. Bailey*, 5 Mart. 321, in which we held that one may have a direct action, on a stipulation in his favor, in a deed to which he was not a party: See, also, *Duchamp v. Nicholson*, 2 Mart. N. S., 672; *Variae Resol.* 700, n. 18; 1

Pothier on Obligations, 45, n. 58, 60; Id. 54, n. 71, 72; ff. 45, 1, 38, sec. 20, 22; 7 Hulo, 19; Paillette, Code Civil, 7, art. 1121 and 1165; 10 Pandectes Francaises, 160, 161; 6 Toullier, 164, n. 448, 449, and our own Civil Code, 262, art. 21.

The defendant's liability was not dissolved by the plaintiff recovering part of his claim from the former vendee. We consider the district judge erred.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, the verdict set aside, and the case remanded, with directions to the judge to proceed thereon as if there had been no trial, and not to charge the jury that the plaintiff had no cause of action, because the deed of sale to the defendant containing no stipulation by which he bound himself to the plaintiff, the latter can not have a direct action against the defendant, for want of privity, and it is ordered that the defendant and appellee pay costs in this court.

See *Schemerhorn v. Vanderheyden*, and note, 3 Am. Dec. 304; *Arnold v. Lyman*, 9 Id. 154, and note.

SAULET v. DREUX'S SYNDICS.

[3 MARTIN, N. S. 615.]

REVERSAL OF A JUDGMENT appointing a syndic does not operate retrospectively, and avoid his acts done while the judgment was in force.

APPEAL from the court of the first district. The opinion states the case.

Trabuc, for the plaintiff.

Morel, for the defendant.

By Court, MARTIN, J. The plaintiff seeks to be relieved from the payment of two notes, which he gave to the defendants, for the purchase of a slave of the insolvent, purchased at sale made by the defendants, on account of the illegality of the sale. The general issue was pleaded; there was judgment for the defendants, and the plaintiff appealed.

The facts of the case are as follows: Wiltz and Ferrier having applied for the homologation of the proceedings of the meeting of the insolvent's creditors, at which they alleged they were duly appointed syndics, J. Dreux, an hypothecary creditor, opposed the homologation, alleging that Wiltz and he were legally appointed syndics, and not Wiltz and Ferrier. He succeeded in his opposition, and the court declared Wiltz and him the

legal syndics on the thirty-first of May, 1823. On their petition, the court ordered a sale of the property, to take place on the ninth of July following. Ferrier appealed, but gave security for the costs only. On the ninth of July, Bouthuny's heirs obtained an injunction for staying the sale, but it was dissolved on the twelfth, and, on the petition of Wiltz and Dreux, the sale was ordered to take place on the twenty-sixth. Bouthuny's heirs appealed from the judgment, setting the injunction aside. The sale took place on the twenty-sixth, when the plaintiff purchased the slave. The heirs of Bouthuny failed in their appeal, and Ferrier succeeded in his appeal, the supreme court declaring Wiltz and him the legal syndics.

On these facts the plaintiff's counsel urges: 1. That J. Dreux never was a syndic, the decree of the inferior court, who declared him such, having been reversed; 2. That Ferrier's appeal suspended the execution of the decree of the inferior court; 3. That the first order of sale was void, being given before the decree, declaring the appointment of the syndics was signed; 4. That the second order did not authorize the sale, as it ordered it in so short time that thirty day's notice could not be given; 5. The injunction of Bouthuny's heirs suspended the sale.

1. The judgment of this court, reversing that by which J. Dreux was declared syndic, can not have any retrospective effect, so as to vitiate acts done by him in the meanwhile.

2. Ferrier having given security for costs only, his appeal was not suspensive, but devolutive.

3. As no sale took place under the first order, it is useless to inquire into its legality.

4. No law is cited, and none is recollected, which fixes the number of days, during which the estate of a bankrupt is to be advertised. In directing the second sale, the court might consider the previous notice already given.

5. The order under which the property was offered for sale was posterior to the injunction, and was, perhaps, given on the consideration of subsequent facts. It was not opposed, or, if it was, no appeal was taken from the opinion of the court, overruling the opposition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

GRIGGS v. AUSTIN.

[3 PICKERING, 20.]

FREIGHT, REFUNDING OF.—If freight be paid in advance it must be refunded, if, without fault of the shipper, the goods are never carried to their point of destination.

AN AGREEMENT TO WAIVE the right to reclaim money paid in advance for freight, is not to be inferred from a clause in the bill of lading, stating that the goods are to be delivered safely, "the dangers of the sea excepted."

FREIGHT IS THE COMPENSATION for the carriage of goods.

FREIGHT ON MERCHANDISE LOST by shipwreck or standing, or by pirates or enemies, can not be collected, and, if wholly or partly paid in advance, must be refunded.

AN ADVANCE OF FREIGHT means the same thing as a payment of freight beforehand, and neither implies a stipulation that the amount paid or advanced shall not be returned if the goods are not carried.

ASSUMPSIT. The opinion states the case.

W. Prescott and J. T. Austin, for the defendants, cited *Watson v. Duykinck*, 3 Johns. 335; *Andrew v. Moorhouse*, 5 Taun. 435; *De Silvale v. Kendall*, 4 Mau. & Sel. 37; *Manfield v. Mailland*, 4 Barn. & Ald. 582; *Gibbon v. Mendes*, 2 Barn. & Ald. 17; *Blakely v. Dixon*, 2 Bos. & P. 321; *Anon.*, 2 Show. 291.

S. Hubbard, *contra*, cited: *Abbott*, 273; *Lane v. Penniman*, 4 Mass. 91; *Mashiter v. Buller*, 1 Campb. 84; *Watson v. Duykinck*, 3 Johns. 335; *Howland v. The Brig Lavinia*, 1 Pet. Adm. 126; *Roccus*, note 80; *Inst. au Droit Marit. par Boucher*, p. 264, art. 966.

PARKER, C. J. This action is *indebitatus assumpsit* on money

counts. It is brought to recover back a sum of money paid by the plaintiffs to the defendants, for the freight of a number of barrels of apples, taken on board their ship, the *Topaz*, bound from Boston to Liverpool. It is proved by the bill of lading, signed by the master, and an account made out by the owners, with their receipt upon it, that the whole freight agreed upon was paid before the sailing of the vessel, and the report finds that before the vessel arrived at her port of delivery abroad, she was stranded or wrecked on a beach within six miles of her port, by means of which a large portion of the plaintiff's apples were destroyed or rendered worthless by the salt water.

This brief statement presents the principal question which has been argued; there are other facts in the report material to some inferior questions, which will be stated in their proper place.

The plaintiffs contend, that the consideration for the payment of the money, was the agreement on the part of the owners to transport the apples in their ship to Liverpool, and that, having failed to do this, they are bound in conscience to return the money, and that an action at law lies for it, upon the ground of failure of consideration. The defendants insist that the payment of the freight in advance imposes all risks upon the owner of the goods, and that the failure of transportation and delivery having happened without their fault, there is no legal or equitable principle which obliges them to refund. Some reliance in support of their defense is placed upon the condition expressed in the bill of lading, that the goods are to be delivered safely, "the dangers of the seas excepted;" but as this condition has in practice been applied only to the contract in relation to the goods themselves, so as to protect the ship-owner from a demand for their value in case of loss by perils of the sea, and has never been construed to bear upon the rights of the parties in relation to the freight, we can not see anything in that instrument which can affect the question before us. This must stand upon the principles of marine or mercantile law, so far as they may have been recognized and adopted, or may be found agreeable to the rules and maxims of the common law.

It is certainly a clear principle of the common law, that when money is paid or a promise made by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money may be recovered back, or the promise founded on such consideration may be avoided between the parties to the contract. This general principle is the foun-

dation of perhaps the largest class of cases which have been sustained under the action for money had and received. Exceptions may be made by a stipulation of the parties, but without such exceptions the rule seems to be universal. And this broad principle of justice has been adopted in the marine law in relation to this subject of freight, upon the continent of Europe, as is very fully proved by the researches made and the cases cited by Chief Justice Kent, in the case of *Watson v. Duykinck*, 3 Johns. 335.

It would be but an affectation of learning to go over the ground which has been so ably preoccupied in the opinion given in that case, especially as the same ground has been traversed by Mr. Justice Story, in a note in his edition of Abbott, on Merchant Ships, etc., which note was avowedly supplied from the opinion of Chief Justice Kent, above cited. I wish for one, since books are so prodigiously multiplied, to spare the profession and the public the expense of reiterated citations on points indubitably settled, when both text and comment may be found in almost every book in a lawyer's library. It is sufficient then, to say, that by reference to the above cited opinion, and the note of Mr. Justice Story, it will be found to be the established law of the maritime countries on the continent of Europe, that freight is the compensation for the carriage of goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary.

The commercial principle recognized by the continental nations, is reduced into the form of a maxim in the Napoleon Code de Commerce, tit. 8, art. 302. "No freight is due for merchandise lost by shipwreck or stranding, plundered by pirates or taken by enemies. The master is bound to restore freight which shall have been advanced, if there is no agreement to the contrary." This, like most of the provisions in the modern French codes, is not the introduction of a new principle, but the new promulgation of antecedent law in a more convenient form, as was the case with the Digest and other works executed under the auspices of Justinian, of whom the Emperor Napoleon was in this respect an imitator.

It is admitted in argument that such is the law of the continental powers, but is suggested that it has not been introduced into the English law, and, therefore, there is no evidence that it belongs to our common law. It is true there are few cases in the English books touching this point, but it is equally true

that the principle has never been denied there; on the contrary, in the case cited from 1 Campb., Lord Ellenborough, who was a great mercantile judge, recognizes it in the full extent of the Code de Commerce, and the cases cited from 4 Mau. & Sel., 2 and 4 Barn. & Ald., and 5 Taun., proceed upon the ground of a stipulation in the several contracts which were under discussion, similar to the exception in the continental rule above cited, and the *obiter* remark of Mr. Justice Bayley, in the case of *De Silval v. Kendall*, that wherever there is an express stipulation that freight shall be paid in advance, there must be an express stipulation that it shall be recovered back if the goods be not carried, if such be the intention, will be found not to militate against the general principle.

A distinction was raised in the argument between payment of freight and an advance of it, it being supposed to be recoverable back in the latter case, but not in the former; but we do not find this distinction supported by authorities, nor do we see any sound reason for it. We think an advance of freight means the same thing as payment of freight beforehand or in advance, and whether the whole is paid or a part, we think makes no difference.

In the English cases cited, a very nice discrimination has been adopted between a contract for freight, which includes an obligation to transport and deliver, and a contract to receive the goods on board the vessel. That a contract of the latter nature may be made, so that it will be considered as executed by the mere lading of the goods, we do not doubt; but we can not think that such a contract can be implied from the mere fact of the freights being paid down, because reasons may, and often do exist for exacting this, without any intention to vary the legal liabilities of the parties. If persons apply for a passage in a vessel, as is often the case between this country and Great Britain, whose responsibility may be doubtful, and they are received on board at the customary price on condition of advancing the passage-money, and the vessel should be wrecked immediately on commencement of the voyage, so that the passengers would have to seek another vessel, and pay their passage-money again, we can not think that the master or ship-owner would have a right to retain the money, unless there were an express agreement to that effect. The case of *Watson v. Duykinck*, above cited, is somewhat of this nature. In that case, the voyage was broken up two days after its commencement, and the passenger, instead of being

carried to the island of St. Thomas, was landed in Connecticut. He, however, was not allowed to recover back the passage-money which had been paid in advance, on the ground that the consideration was an agreement on the part of the master to suffer him to proceed in the sloop, etc., and that the master had suffered him to come on board, which was an execution of the contract. I confess this does not seem to me to be the most obvious effect of the contract; but it was by this construction only that the defendant prevailed, the court being clear that were it a common case of passage-money paid in advance, by the principles of the marine law engrafted into the common law, it must have been recovered back. The same principle applies, with equal force, to money paid in advance for the freight of goods. Such payment does not import a relinquishment of any right, for it may have been exacted, because the goods themselves might not be a sufficient security for the freight, and the owner of the goods might not be responsible.

The case before us is likely to have been of that kind. Fruit was the subject of the contract; it was of a perishable nature, and liable to great uncertainty as to its value in a foreign market; the owner of it may have been a person of no property; and for these reasons the payment down may have been exacted.

But one of the counsel for the defendant has put the case on ground which admits the general principle, that freight may be recovered back when the goods are not delivered, unless there be an agreement to the contrary, but he insists that such an agreement does appear from the evidence; that is, from the bill of lading and the receipt on the account. But we think they furnish no evidence of such an agreement; they merely prove that the freight was paid in advance.

Indeed, it will be seen at once that if the payment of freight thus proved were to be construed into a stipulation that it should not be recovered back, the whole doctrine of the marine law on this subject would be useless. The maxim is that freight paid in advance, if the goods be not carried, shall be returned, unless there be a stipulation to the contrary. Now, if the mere payment proved such stipulation, there would be no case for the rule to operate upon. So that, when Mr. Justice Bayley says that where there is an express stipulation to pay freight in advance, there must also be an express stipulation to pay it back in order to entitle the shipper to recover, he means some-

thing more than the mere payment of the freight, which may be equivocal. He means undoubtedly an express stipulation in the contract, because it might be inferred from such a stipulation that the parties had calculated hazards, and that an equivalent had been obtained in some form for the advance of money, which otherwise would be due only on a contingency. And he was there reasoning upon a case which might fairly sustain such an argument.

It is said that the rate of exchange between this country and England gave an advantage to the plaintiffs which may have been the consideration for paying freight in advance. That fact does not appear in the report, and if it did, it could not affect our decision. If the intent of the parties had been submitted to the jury, as was done by Chief Justice Gibbs, in the case cited from 5 Taun. 435, it might have been material, but we do not find that the fact was offered to be proved at the trial, so that we do not see that any use can now be made of it.

Judgment for the plaintiffs.

Cited in *Brown v. Harris*, 2 Gray, 360; *Minturn v. Warren Ins. Co.*, 2 Allen, 89; and in *Leckie v. Sears*, 109 Mass. 429.

HALL v. YOUNG.

[3 PICKERING, 80.]

JUDGMENT AGAINST A CONSUL of a foreign nation upon default is valid. His not appearing and pleading to the jurisdiction of the court, is a waiver of the want of jurisdiction over him.

SCIRE FACIAS against Young as bail of George Manners to a writ issued from the court of common pleas. Pleas, that at the time of the impetration of the original writ, Manners was, and ever since has been, consul of the king of the United Kingdom of Great Britain and Ireland, duly accredited to the president of the United States; and *nul tiel record*. Demurrer to the first plea; issue joined on the second. Plaintiff produced the record of the action of Hall against Manners, from which it appeared that Manners had pleaded to the jurisdiction of the court that he was a consul, and that upon a continuance from term to term Manners was defaulted, and judgment rendered against him. The common pleas decided against Young on both of the issues; whereupon he took exceptions.

Bliss, for the defendant. The courts of the United States

have exclusive jurisdiction in cases relating to consuls: U. S. Laws, 1 Cong. 1 Sess. c. 20, sec. 9; *Manhardt v. Soderstrom*, 1 Binn. 138; *United States v. Ravara*, 2 Dall. 297; *Commonwealth v. Kosloff*, 5 Serg. & R. 545; *United States v. Lathrop*, 17 Johns. 4. The arrest was therefore a nullity: *Pearce v. Atwood*, 13 Mass. 344; *Winslow v. Hathaway*, 1 Pick. 211; *Turner v. Felgate*, 1 Lev. 95. If the original writ were voidable only, and on the ground of a personal privilege, the bail are nevertheless entitled to be discharged: *Crossley v. Shaw*, 2 W. Bl. 1087; *Merrick v. Vaucher*, 6 T. R. 50; *Robertson v. Patterson*, 7 East, 405; *Commonwealth v. Riddle*, 1 Serg. & R. 311. The bail may take advantage of the want of jurisdiction: *Davol v. Davol*, 13 Mass. 264; *Smith v. Rice*, 11 Id. 514; *Martin v. Commonwealth*, 1 Id. 347; *Lawrence v. Smith*, 5 Id. 362.

Washburn, contra. Upon a *scire facias* advantage cannot be taken of anything which might have been shown as a defense to the original action: *Wilcox v. Mills*, 4 Mass. 218; *Thatcher v. Gammon*, 12 Id. 269; *McFarland v. Irwin*, 8 Johns. 77; *Mechanics' Bank v. Hazard*, 9 Johns. 392.

By Court, PARKER, C. J. If it had been shown upon a plea to the jurisdiction in the original action that Mr. Manners was a consul, a judgment against him would have been erroneous, and the bail would be discharged. But the fact does not appear on the record in that action, and the agreement to be defaulted was a waiver of the want of jurisdiction. It is said that all courts are to take notice of a person's being a consul, on account of his *exequatur*, but he may be a consul one day and cease to be such the next, and yet his *exequatur* may not be taken from him. When therefore he is sued, if he would avail himself of his privilege, he must make it appear that he was a consul, unless the other party shows it, as by calling him consul in the original writ.

Judgment affirmed.

Followed in *Springfield Card Mfg. Co. v. West*, 1 Cush. 389.

UNION BANK v. KNAPP.

[3 PICKERING, 96.]

BANK BOOKS—EVIDENCE.—Entries in the books of bankers are evidence to show receipts and payments of money in an action against a depositor for overdrawing. If the clerk who made the entries is dead or insane, or out of the jurisdiction of the court, the books may be admitted on proving his handwriting.

BANK BOOKS, RIGHT TO INSPECT.—The depositors are entitled to inspect the books of the bank on all proper occasions, and the officers having charge of the books are, so far, agents of both parties.

EXCLUSION OF WITNESS.—A clerk of the bank who is supposed to have made a mistake, through which a depositor was enabled to overdraw, is not, on that account, incompetent to be a witness for the bank in an action against the depositor.

OPEN RUNNING ACCOUNT—LIMITATIONS.—When an account between merchants, or between banker and depositor has been balanced, and the balance carried forward, it is no longer an open running account. The parties can not go behind the settlement without leave obtained in chancery, and the statute of limitations runs against the balance from the settlement of the account.

CREDITS IN A DEPOSITOR'S book are as binding on the bank as a formal receipt.

A STATED ACCOUNT is an agreement of both parties that all the charges are true, and is conclusive until leave is given to surcharge, falsify or open it.

ASSUMPSIT for money had and received. Pleas, the general issue, and the statute of limitations. The defendant had been a depositor in the plaintiff's bank, and this action was brought to recover an amount of money overdrawn by the defendant, with which sum he had been credited on the books of the bank, through mistake. The journal and the ledger of the bank were offered and received in evidence against defendant's objection. From the ledger it appeared that the cash to defendant's credit in November, 1817, when correctly added, amounted to one thousand dollars less than the actual footing. A balance was struck every month, and the sum of one thousand dollars was included in and carried forward on each account. The relations of the bank and of the defendant ceased in February, 1824, when a small balance of twelve dollars and twenty-four cents in the latter's favor was paid on his check. The journal contained similar items of charge and credit with the ledger, except the footing at the end of each month, and it was stated by the plaintiffs, and not denied, that if the sums drawn out or charged on the one side, and the deposits on the other, were respectively added from Nov. 1, 1817, to Feb. 1, 1824, the balance of nine hundred and eighty-eight dollars and seventy-six cents would be found overdrawn. The blotter of the receiving teller, containing entries of deposits, was received in evidence against the defendant's objection. The receiving teller was alleged to be insane, and his handwriting was, therefore, allowed to be proved. From the blotter it appeared that the deposits therein entered corresponded with the credits given the defendant on the journal.

The plaintiffs notified the defendant to produce his bank books, and defendant made affidavit that he could find none save two, commencing with 1823, which two he produced in court.

One Adams testified for the plaintiffs that he had been cashier of the bank since 1819; that it was customary with banks to take a trial balance once a month, but that none had been correctly taken at this bank for several years before he was made cashier; and he stated that the error in question had been discovered by means of the trial balance. Emmons, the clerk who had made the mistake, was offered as a witness to testify to the mode of keeping the ledger. He was objected to on account of his interest, and on being asked whether he expected to gain or lose by the event of the suit, said that he did not know whether he was accountable to the bank or not, but that if the bank should lose and should require it of him, he would sell anything he had. He was admitted and testified that he had been head clerk for thirty-two years, and that it had been his custom to look in the ledger before striking the balance in a depositor's book. The journal of 1817 was offered in evidence and Emmons allowed to testify to the handwriting of the clerk who kept it, he being dead.

Verdict for the plaintiff. Motion for a new trial.

Prescott, in support of the motion.

Loring and S. Hubbard, contra. The ledger and journal are competent evidence; they are the only evidence plaintiff can have; the checks, upon which payments have been made are returned to the depositor according to the custom among banks, and the deposit book is in his possession and cannot be produced without his consent. The checks are given up on the ground that they have been entered in the books, and that his books are a counterpart of the books, so that he tacitly consents that the bank may substitute their books for evidence of those checks: *Price v. Torrington*, 1 Salk. 285; *Welsh v. Barrett*, 15 Mass. 380; *Etans v. Lake*, Bull. N. P. 282; *Dixon v. Cooper*, 3 Wils. 40; *Benjamin v. Portens*, 2 H. Bl. 590; *Wyndham v. Chetwind*, 1 Burr. 422; *Martin v. Horrell*, 1 Str. 647; *Poultney v. Ross*, 1 Dall. 239; *Curren v. Crawford*, 4 Serg. & R. 3; *Vosburgh v. Thayer*, 12 Johns. 461; *Cogswell v. Dolliver*, 2 Mass. 217 [3 Am. Dec. 45]; *Herman v. Drinkwater*, Greenl. 27. The journal and the blotter were properly admitted. The death or insanity of the clerks who kept them was immaterial, their handwriting

being proved: *Lewis v. Norton*, 1 Wash. 76; *Pritt v. Fairclough*, 3 Campb. 305; *Welsh v. Barrett*, 15 Mass. 380; *Kennedy v. Fairman*, 1 Hayw. 458; *Adam v. Rogers*, 1 Bay, 480. Emmons was a competent witness: *Union Bank v. Clossey*, 12 Johns. 271; *Pederson v. Stoffles*, 1 Campb. 144; Phil. on Ev. 50, 51; *Gilpin v. Vincent*, 9 Johns. 219. To exclude a witness, the interest must be such as could be used in a subsequent suit against him: *Stockham v. Jones*, 10 Id. 21; *Case v. Reeve*, 14 Id. 79; *Rex v. Cole*, Peake's Cas. 217; *Rex v. Teasdale*, 3 Esp. 68; *Newland's case*, 1 Leach, 353. In regard to the statute of limitations, this is an open account; every new item is an admission of an unsettled account: *Callin v. Skoulding*, 6 T. R. 189; *Cogswell v. Dolliver*, 2 Mass. 217 [3 Am. Dec. 45].

By Court, PUTNAM, J. We are in the first place to consider, whether the books of the bank were competent evidence. It was said by Lord Kenyon, in *Cooper v. Marsden*, 1 Esp. 1: "That the rule of evidence was clear, that entries in the books of bankers or persons keeping books respecting their trade or business, could only be proved by the clerks who had made the entries," and he rejected evidence of the handwriting of the clerk who had been in India. It seems to have been taken for granted, in that case, that the books of bankers were to be received in evidence, if properly proved. No other objection was made, but that the clerk who made the entries was not in court to prove them. It was not suggested, that if he had been present and had proved them, the books would not have been competent evidence.

We think the remark that such books could only be proved by the clerk who made the entries, requires some qualification. If, for example, he had deceased, it seems very clear from the cases cited by the plaintiffs' counsel, that proof of his handwriting would have been admitted; and the same judge, in *Digby v. Stedman*, 1 Esp. 328, admitted the book of a watchmaker, which was in his own handwriting, as competent evidence in corroboration of the testimony of his servant, who testified to the delivery of a watch charged in the book. In the case cited of *Cooper v. Marsden*, the testimony of the clerk might have been obtained. He was living, although beyond seas. In Pennsylvania proof of the handwriting would be admitted, if the clerk were dead or out of the jurisdiction of the court: *Sterrett v. Bull*, 1 Binn. 137.

Many cases are to be found, where the entries of servants, stewards, and attorneys, in the books of their principals, or in books kept by and for themselves have been admitted as evidence

after their decease. Thus in *Doe v. Robson*, 15 East, 32, where the point in controversy was, when a certain lease was delivered, the charge of the attorney, who had deceased, was admitted to prove that it could not have been written when it bore date. In *Lewis v. Norton*, 1 Wash. 76, it is laid down as a general proposition, that "ever since the decision in *Lord Torrington's case*, the law has been settled, that a book of accounts in the handwriting of, and kept by a clerk who is since dead, is proper evidence upon those facts being proved."

The case cited by the plaintiffs' counsel, of the *Assignees of Sir Stephen Evans v. Lake*, Bull. N. P. 282, is strong to this point. The question was, whether eight shares which Lake had purchased in his own name were in truth for the account of Evans. Six of the receipts were in the hands of Evans, upon which his bookkeeper, who was proved to be dead, had made memoranda referring to the book of Evans, wherein was a charge of the payment of the money by Evans. The book was admitted not merely as to the six, but likewise as to the two which were in the hands of Lake's son. So a memorandum upon a paper purporting to be a copy of a license, made by a merchant's clerk who was deceased, was admitted as evidence tending to prove that he had sent the original, according to his usual manner of transacting the business: *Hagedorn v. Reid*, 3 Campb. 379.

So the entries of a steward, who had afterwards deceased, of sums paid by trespassers, were held competent evidence in a cause relating to the title of his master: *Barry v. Bebbington*, 4 T. R. 514. The case in our own books of *Welsh v. Bassett*, 15 Mass. 380, is to the same point. There the memoranda of a messenger of a bank, who had deceased, was admitted as tending to prove notice to indorsers. And there is a peculiar reason in the case at bar, why the books of the bank should be given in evidence, for the bank furnishes transcripts of them to its depositors, which in effect operate as the mutual acknowledgment of the parties, as to their money dealings. In this respect, it is like the case of *Wiltzie v. Adamson*, where Lord Kenyon admitted in evidence a book kept by servants at an inn, for articles delivered to a club, it appearing that the members of the club had access to the book: 1 Phil. on Ev. (sixth ed.) 252. And we are of opinion, that the books are to be open for the several depositors, and that the bank is bound to produce them on all proper occasions. The officers of the bank having the charge of the books, are to be so far considered as agents for both parties.

But it is objected that Nathaniel Emmons was not a competent witness to prove the entries made by him in the ledger which he kept, on account of interest. In answer to the question, whether he expected to gain or lose by the event of the suit, he said, "that he did not know whether he was accountable or not, and, if this money should be lost, he would sell his house or anything else, if required by the bank;" he said, "the error was of his making." If it was error only, and not a breach of trust, he would not be liable for it: *President etc. of Union Bank v. Clossey*, 10 Johns. 271. It was also at most a conditional liability, depending upon the requisition of the bank, which, it is not to be presumed, would be made in a case of mere mistake, and which, if made, would be fruitless. The witness was under a mistaken notion that he was bound in honor to compensate for his innocent mistake; but such an opinion does not disqualify a witness: *Pederson v. Stoffles*, 1 Campb. 166. It must be a direct interest which is to render a witness incompetent: *Id. in notis*. But it is further objected, that the clerk who made the entries in the blotter is not produced, and, therefore, that the blotter should not have been admitted in evidence; but it is alleged and not denied, that he has become insane. If he were dead his handwriting might be proved, as was done in the case of the clerk who kept the journal, and who has deceased: *Pitman v. Maddox*, 2 Salk. 690. His insanity renders him as unable to testify as his death would have done. His handwriting was, therefore, properly proved by another witness.

The objection that the entries were not made by the persons who paid out the money charged, we think ought not to prevail, because, according to the course of the business, the correctness of the charges of the bank is to be ascertained by the depositor from his checks, which are delivered up every month when his bank book is settled, and if he is careful to preserve his bank book, he has the means of detecting any error. The credit which is given to him, being in the handwriting of some one authorized by the bank to make it, is as obligatory upon the bank as a formal receipt given for every sum deposited would be. The books having been authenticated, as before stated, were properly submitted to the jury as competent evidence, and they were the judges of the weight of the evidence.

It will be perceived that this decision does not touch or enlarge the doctrine of the admissibility of the books of a merchant or other person, who makes the entries himself, and who is permitted, according to the practice in Massachusetts, and in most,

if not all, of the New England States, to make his suppletory oath respecting the charges. In regard to cash, the sums to be proved in that manner have been limited in this state to forty shillings, or six dollars and sixty-six cents. But this decision proceeds upon the ground before stated, warranted by the authorities of the common law, and independently of our local usage, which admits the party in certain cases to verify his books of account by his own oath.

There is, however, another matter of defense which we think a sufficient answer to this action, and that is the statute of limitations. It appears that the supposed mistake was committed in November, 1817. The defendant has pleaded that the cause of action accrued more than six years prior to the commencement of this suit. The plaintiff has replied that the defendant has promised within six years, and he contends that the account is open, mutual, and running from that time until January, 1824. If that is true, the law is well settled that every charge within six years is to be considered as an acknowledgment that there is an unsettled account, and as evidence of a promise to pay the balance. Thus in *Calling v. Skoulding*, 6 T. R. 189, the testator was an attorney, and his demand against the defendants was for rent. The defendants filed a set-off for articles of merchandise furnished by them as vintners and tallow chandlers. But the case finds expressly that there never was any settlement of accounts between the testator and the defendants. It appeared that the last half year's rent on one side, and one or two articles of merchandise on the other side, were charged within six years. Lord Kenyon delivered the opinion of the court, and said that "every new item and credit in an account given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute." And he made the proper distinction between that case and the case of *Cotes v. Harris*, Bull. N. P. 149, where the items were all on one side, holding that in such case the last item within six years should not draw after it those items which were of longer standing. This case seems to us to have been rightly decided.

But we do not think that the facts in the case at bar do prove this account to have been open and running from November, 1817, to January, 1824. On the contrary, it is proved that the accounts have been stated and settled monthly, and that the

checks, which were the vouchers for all the charges against the defendant, were then given up. It is contended, however, by the counsel for the plaintiffs, that as the accounts did not exactly balance each other at the end of each month, and as the money was not in fact paid by the one to the other party, who happened to be the creditor, but the differences were carried forward from time to time, therefore, the accounts must be considered as open and running on, notwithstanding those monthly settlements; and we are referred to the case of *Farrington v. Lee*, 1 Mod. 269, and 2 Id. 312, as authority for the position.

That was an action of assumpsit grounded upon an account which had been stated more than six years before. The defendant pleaded the statute of limitations. The plaintiff replied that the account was between merchants, and concerned trade and merchandise, and so was excepted from the operation of the statute; but the court gave judgment for the defendants, and held that where the account is once stated (as it was in that case) the plaintiff must bring his action within six years. That was decisive of the case in favor of the defendant; but the court undertook to settle a point not required to be decided in that case, which is now relied upon by the counsel for the plaintiff, viz., that "if the account be adjusted, and a following account is added, in such case the plaintiff shall not be barred by the statute, because it is a running account." But to what is the following account to be added? Not to the former account as it stood, but to the balance of the former account as it had been settled. That balance constitutes one of the items of the new account, and if the new account shall run on mutually to a time within six years, that balance, although arising more than six years before, will be saved and drawn out, as it is sometimes expressed, from the operation of the statute, by the charges which are within six years. If that case is to have this construction, it is to be supported, and is conformable to the doctrine laid down by Lord Kenyon in *Calting v. Skoulding*, before cited. For example, suppose that the balance of the account stated in November, 1817, had been carried to a new account, which had continued to run on mutually until January, 1824, without any intervening settlement. In such case, the law would infer a promise to account for all the items in such new account, and to pay the balance of the same; but this construction will not avail the plaintiff, because the account which was added to the balance of November, 1817, did not continue open and running

until January, 1824, but was open and running only for a month at a time. Three or four statements and settlements were made by the parties between November, 1817, and the commencement of the six years next before this suit was brought.

The plaintiff cannot prevail unless we adopt the argument of his counsel, which has been pressed with much force and ingenuity, that where accounts are settled by carrying the balances forward, instead of paying the same in cash, they are to be considered as open and running accounts from the beginning, and so not within the statute of limitations. We do not think this inference is to be drawn from the case of *Farrington v. Lee*, cited for the plaintiff; but, if it is, we should consider that this point was as erroneously decided as was another in the same case, namely, that the saving clause in the statute as to merchants' accounts extends only to actions of accounts. It is now settled that the exception is to be applied to actions of assumpsit, as well as to actions of account: *Mandeville v. Wilson*, 5 Cranch, 18. Indeed, contradictory and unsound opinions touching the exception in the statute, are not only to be found in that case, but they abound in the books of law. Lord Eldon, in *Foster v. Hodgson*, 19 Ves. 184, thinks that the opinions in regard to the question, whether the same law that applies to open accounts applies to merchants' accounts, are not to be reconciled, one opinion being, that accounts between merchants are not within the statute at all, but stand just as they would if no statute of limitations had been made, while another, and it seems to us the better opinion, is, that they are barred by the statute, if more than six years have passed since the dealing ceased: *Barber v. Barber*, 18 Ves. 286; *Webber v. Tivill*, 2 Wms's Sand. 127, and notes 6 and 7.

But, however that may be, the point now under consideration is, whether the accounts between these parties were open and current from November, 1817, so as to warrant the direction to the jury that the law inferred a promise to pay within six years.

We have met with no case where accounts, which had been so settled, were held to be open from the beginning, because the balances were carried forward instead of being paid in cash. Nor is it reasonable that it should be so. Lord Hardwicke, in *Welford v. Liddel*, 2 Ves. sen. 400, considered that the exception in the statute relating to merchants' accounts "was to prevent dividing the account between merchants, where it was a running account, when perhaps part might have begun long before and the

account never settled, and perhaps there might have been dealing and transactions within the time of the statute." Now it would be just as contrary to the meaning of the statute to open an account stated, as it would be to divide a running account. And can it be said that the parties in this case have not settled? Are there accounts unliquidated as if no statement of them had been made? A stated account is an agreement by both parties that all the articles are true: *Trueman v. Hurst*, 1 T. R. 42. And upon an *insimul computassent* the plaintiff is not obliged to give evidence of the articles. It is sufficient if he prove the account stated: *Bartlett v. Emery*, 1 T. R. 42, *in notis*. "An account between partners in trade, after the death of one of them, shall be taken only from the time the same was last balanced:" *Beak v. Beak*, 1 Vin. Account (D. a.), Pl. 3.

A stated account was formerly held to be conclusive, and it is now so considered, until leave is given to surcharge, falsify or open it. That is obtained by a bill in chancery for that purpose. In a bill before Lord Thurlow, to open an account which had been settled, he held that the expression of "errors excepted" did not prevent its being a settled account; and he considered the fact, that the balance had been carried over, as showing that the account had been settled: *Johnson v. Curtis*, 3 Bro. C. C. 266.

The acknowledgment which is to be inferred from the mutual and open accounts within six years, should be limited to the items appearing in the same. If, for example, one of the items should be a sum of money, being the balance of a former account, settled more than six years before the action, it would be protected from the operation of the statute by the items which are within six years. In such a case the law would infer a promise to settle for all the items of the new account. The promise and acknowledgment may be reasonably extended so far; but not to the various charges and disbursements in former times, from which the balance charged in the open account arose. What of doubt now appears, might, in the time of the transaction, have been explained by papers, vouchers or witnesses; but it would be doing great violence to go behind the account which is open and current, and behind a hundred or more stated accounts, to inquire if, at some former period during the trade between the parties, perhaps some twenty or forty years ago, a mistake did not happen in one or more of the settlements, which, if corrected, would make the balance, constituting one item in the open account, to be either too little, or too

great, or on the other side. We do not think the case of *Far-ington v. Lee* will warrant such a construction; and if it will, we cannot yield to its authority. Such a decision would lead to great perplexity, vexation and uncertainty in commercial concerns, and would open a door to endless litigation.

We are, therefore, of opinion that a new trial should be granted.

UPON THE QUESTIONS of evidence arising in the *Union Bank v. Knapp*, reference to the decision has been made in *North Bank v. Abbott*, 13 Pick. 471; *Burns v. Fay*, 14 Id. 12; *Shove v. Wiley*, 18 Id. 564; *McKavlin v. Bresslin*, 8 Gray, 178; *Amherst Bank v. Root*, 2 Met. 544; *Watson v. Phoenix Bank*, 8 Id. 221; *Holbrook v. Gay*, 6 Cush. 217; *Holbrook v. Jackson*, 7 Id. 147; and in *Jones v. Howard*, 3 Allen, 224. In regard to the application of the statute of limitations to open and mutual accounts, the principal case is relied upon in *Belchertown v. Bridgman*, 118 Mass. 488.

BOOKS OF ACCOUNT AS EVIDENCE.—It is the generally accepted law in this country that entries made in the usual course of business by a clerk are admissible in evidence after his death on proof of his handwriting: *Welch v. Barrett*, 15 Mass. 380; *Waller v. Curtis*, 116 Id. 98; *Clarke v. Rist*, 3 McLean, 492; *Livingston v. Arnoux*, 56 N. Y. 518; *Fisher v. Mayor*, 67 Id. 73; *Mayson v. Beazley*, 27 Miss. 106; 1 Greenl. Ev., sec. 117, *et seq.* In many of the states the rule prevails that books of original entries made by a party in the regular course of his business may be received in evidence after his death, the foundation being laid that the books in question are books of original entry and are proven to be in the handwriting of the decedent: *Hoover v. Gehr*, 62 Pa. St. 136; *Patrick v. Jack*, 82 Ill. 81; *Bentley v. Hollenback*, Wright (O.), 168; *Buckley v. Buckley*, 12 Nev. 423; and *New Haven etc. Co. v. Goodwin*, 42 Conn. 230; *State v. Phair*, 48 Vt. 366, instances of entries made by a partner, in the one case, without the jurisdiction of the court, in the other case, dead; and in other jurisdictions where, as will be subsequently shown, the books would have been admissible if supported by the oath of the party himself. The editors of the sixth edition of Smith's L. Cas., in their note to *Price v. Earl of Torrington*, vol. 1, sec. 397, go still farther, and state: "Taking the American cases together, the principle derivable from them is, that entries made in the regular course of the person's business or employment, though he was not a public officer and though it was not his duty to make the entries, are admissible evidence after his death."

The reason of the rule admitting in evidence the original entries of a deceased clerk is stated in *Welch v. Barrett*, 15 Mass. 380, to be as follows: "The principle seems to be founded in good sense and in public convenience. What a man has said when not under oath may not in general be given in evidence when he is dead; because his words may be misconstrued and misrecalled; as well as because it cannot be known that he was under any strong motive to declare the truth. Yet there are well known exceptions to this rule as in questions concerning pedigree. But what a man has actually done and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury." It is noticeable that this rule proceeds upon the motive of the one making the

entries; and not upon the question whether the entries refer to the person's own business, or to that of others by whom he was employed. Nor, so far as the soundness of the principle there announced is concerned, is any such distinction of interestedness necessary. Entries made at the time acts took place, by one whose duty it was to keep a record of such acts, or by the tradesman whose habit it was, in the course of his business dealings, to preserve a minute of them himself, ought equally to be received as evidence of those acts. The mere fact that the accounts in the latter case may be to the interest of the party making them should not of itself cause their rejection. In the former case, it is uniformly urged in support of the admissibility of the books of items, that it will be presumed that he who was in duty bound to keep a faithful transcript of events has performed his duty. The presumption, drawn from honesty of purpose, appears to be just as strong in the latter case where the merchant writes up his own books of debts and credits, and at least should not be overthrown by the mere appearance of a balance in his favor. It is nevertheless settled in several states, that the doctrine of interestedness should apply where one offers books kept by himself; and in those states, of course, the books can have no higher value after the death of the party, by proof of his handwriting, than they could possess, when supported by the oath of the party himself.

The rule of evidence applicable to the entries of persons since deceased has not been confined to purely mercantile transactions. It has been extended to many other entries made in conformity to the reasons set forth in *Welsh v. Barrett*. In *Leland v. Cameron*, 31 N. Y. 119, a turning point was the issuance of a certain execution. The only evidence on that subject was the entry of the attorney in his register. The attorney was dead, and in ruling the register competent, Mullin, J., speaking of such entries, said: "That all entries or memoranda made in their course of business or duty, by any one who would at the time have been a competent witness of the fact which he registers, are competent. In these are included entries of notaries and bank receivers, as to the demand and protest of notes: 15 Mass. 383; 7 Wend. 160; merchants' clerks, surveyors and engineers, and commercial agents: 1 Greenl. Ev., secs. 115-117. That it is the practice of lawyers to keep entries of the proceedings in a cause is as well known as that merchants keep books in which are entered goods sold on credit. It is as much the duty of the lawyer to keep a record of such proceedings, as of the notary of the time of making demand of payment of a bill or note, or of the time and manner of serving notice of non-payment." This conclusion is adopted in *Livingston v. Arnoux*, 56 N. Y. 518, and in *Fisher v. Mayor of New York*, 67 Id. 73.

The memoranda of the result of the examinations and calculations made by a surveyor, since deceased, in the course of his employment under the agreement of the parties, were received in evidence in *Walker v. Curtis*, 116 Mass. 98. And the entries in a physician's book for professional services, he being dead, were admitted in *Augusta v. Windsor*, 19 Me. 317.

The cases heretofore referred to are ones involving the admissibility of the account books of persons deceased. The principle governing the admission of such books upon proof of the handwriting has, in the majority of states, been extended to include entries made by clerks without the jurisdiction of the court: *Clarke v. Rist*, 3 McLean, 492; *Chaffee v. United States*, 18 Wall. 516, 541; *Cummings v. Fullam*, 13 Vt. 434; *Bartholomew v. Farwell*, 41 Conn. 107; *New Haven etc. Co. v. Goodwin*, 42 Id. 230, where the books offered had been kept by a partner who had "gone to parts unknown." Chief Justice

Park, in admitting the books, said that the same necessity existed for receiving them in evidence that would have existed had the partner been dead.⁴ If such had been the case, they would undoubtedly have been evidence: 1 Smith's L. Cases, 225, 231; *Livingston v. Tyler*, 14 Conn. 493; *Stiles v. Homer*, 21 Id. 507; *Bulter v. The Cornwall Iron Co.*, 22 Id. 335; *Ashmead v. Colby*, 26 Id. 287; *Bartholomew v. Farwell*, 41 Id. 107. In Pennsylvania, *Atter v. Berghaus*, 8 Watta, 77, absence from the state, as far as it affects the admissibility of secondary evidence is said to have the "same effect as the death of the witness." So, also, in Maryland: *Reynolds v. Manning*, 15 Md. 523; and South Carolina: *Elms v. Chevis*, 2 McCord, 349; *Foster v. Sinkler*, 1 Bay, 40; but not if the witness is in the state: *Tunno v. Rogers*, 1 Bay, 480.

Insanity is regarded equivalent to death in entitling a party to produce entries on proof of the handwriting: *Holbrook v. Gay*, 6 Cush. 216; *Chaffee v. United States*, 18 Wall 516, 541; *Mahaska Co. v. Ingalls*, 16 Iowa, 95.

The value of original entries is said by 1 Greenleaf on Ev., 1 vol. 120, to be in the fact that they were contemporaneous with the principal fact done, forming a link in the chain of events, and being part of the *res gestæ*; that they are not merely the declarations of the party, but are verbal contemporaneous acts, belonging ordinarily and naturally to the principal thing; and that therefore it can make no difference as to their admissibility whether the party who made them be living or dead, or was or was not interested in making them. In certain of the states, this statement is not accepted in its full meaning, and the admissibility of entries and memoranda, placed upon the necessity of the case where the person who made them is dead. If such person be alive, though out of the state, he must be called, or examined on commission, otherwise his entry can not be received: *Brooster v. Doane*, 2 Hill, 537, citing *Wilbur v. Selden*, 6 Cow. 162; *Merrill v. Ithaca etc. R. R. Co.*, 16 Wend. 595. This ruling of the New York Courts is opposed to that of the states permitting proof of the handwriting where the party is alive, but is out of the state, or is insane.

From the reasons given for the admissibility of entries, first, that they are part of the *res gestæ*, and second, that necessity and general convenience compels their admittance, it seems conclusively to follow that the entries if shown by competent proof to have been made by one whose duty it was to make them, and at such a time and in such a mode that they must be regarded as original entries, ought to be admitted in evidence, whether the person who made them is produced in court or not, or whether his absence be accounted for or not, especially when it is shown that his books are generally correct. The presence or absence at the trial of the clerk who made the entries does not make them any more or less a part of the *res gestæ*. Others as well as he may testify that they were made by him in the course of his duty; that they were made at the time the transactions to which they refer occurred; that they are original entries; that his records and books were correctly and faithfully kept, and that his reputation for accuracy and honesty is deservedly high. In the event of the clerk's death his handwriting is universally held essential to be proved, and from the establishment of that fact, the presumption of correctness and regularity in the accounts arises, there being nothing on their face to repel such presumption. The clerk, if alive and present, would not be required to remember the particular transaction set forth in his books. Those books might be correctly admitted in evidence, although he had no recollection of any one of the items or transactions in controversy. His evidence, if taken, might be confined to the

formal proofs, viz., that the books were books of original entry, and were kept by him in the performance of his duty, and that the entries were made at or near the times when the sales or other transactions took place. If all these facts be proved by other competent witnesses why not admit the books? The authorities, however, so far as discovered, seem to hold otherwise, and to require the person who made the entries to be produced as a witness, unless his absence be accounted for by proof of his death, or insanity, or of some other fact rendering impossible the production of his evidence: *Chaffee v. United States*, 18 Wall. 516, 541. But the opinion of the court in this case upon this point is a mere *dictum*, because the books which were held to be inadmissible, were made up by certain collectors, who had no personal knowledge of the facts, and who, in making their entries, acted upon statements made by others to them. In such a case the books were inadmissible, whether the collectors were present as witnesses or not. In truth, the collector was sworn, and from his evidence the inadmissibility of the books was established beyond controversy.

MEMORANDA REFRESHING MEMORY.—The admissibility of memoranda to enable a witness to refresh his memory in regard to the facts to which they relate proceeds upon a different theory from that which we have been considering. In this instance, if the witness does actually recall the transactions through the aid of the memoranda, he thereafter testifies to matters within his knowledge, and the weight of his testimony is to be regarded independently of the memoranda. These memoranda, therefore, may as well be copies as originals, there being no especial importance attaching to them other than their power to awaken the memory of the witness: *Bullock v. Hunter*, 44 Md. 416.

Again, the witness may not remember the facts as recorded by the memoranda, but still may have such confidence in entries, which he has kept, as to undertake to testify to their truth. In such a case the testimony and the memoranda should both go to the jury, and for that purpose the entries must be original, and made about the time the acts transpired. This question arose in *Lapham v. Kelly*, 35 Vt. 195, 200, and the court approving the admission in evidence of a certain pass-book, to refresh the memory of a witness, said: "Formerly the rule in England seems to have been that such a memorandum could only be used by the witness, and if, on reference to it for the purpose of refreshing his memory, he could not recollect the facts contained in it, his testimony was excluded, and whether he had a present recollection of the facts or not, the memorandum could not be used or allowed to go to the jury. But a more liberal rule seems now to prevail there. It is now there left to the witness to say whether he has such confidence in the accuracy of the memorandum that he is willing to testify to the fact; if so, his evidence is received, although he at the same time says that he has not a present recollection of the facts. The rule that has latterly prevailed in this country is equally liberal, and, in one respect, more so, as the memorandum or entry is often allowed to go to the jury with the testimony of the witness. If the witness testifies that the facts were within his knowledge and recollection at the time he made the entry, is confident he made it correctly about the time of the transaction, and still recollects the transaction generally, although not all the details of the entry, his evidence is received in connection with the memorandum, and both go to the jury, and the memorandum is regarded as auxiliary to or confirmatory of the witness, and may also be used as evidence of the details to supply the present want of recollection, particularly as to names and dates. There are cases which go

farther, and hold that it may be used in connection with such evidence as to its having been correctly made at the time of the transaction, although the witness cannot recall to his recollection any of the facts indicated by it. Such entries are auxiliary evidence, also, when the witness still professes to recollect the facts, as many of the cases hold. This is reasonable, as on inspection of the entry by the jury, it may contain internal evidence as to the time when it was made, and if made, at the date of the transaction, it tends to confirm the witness, as he would be less likely to have forgotten the transaction when he made the entry than when called on to testify after a lapse of time, without any contemporaneous entry or memorandum to refresh his recollection. Hence it is proper that the entry should be submitted to the jury." This decision is re-affirmed in *Cross v. Bartholomew*, 42 Vt. 206. The same doctrine is asserted in *Lewis v. Ingersoll*, 1 Keyes, 357.

As suggested in the opinion quoted from *Lapham v. Kelly*, there is a still further extension of the rule pertaining to the admission in evidence, of entries and memoranda, where the clerk is present in court. It is, as stated in *Spann v. Baltzell*, 1 Fla. 321, when the entries have been made in the usual mode of business, and are duly authenticated by the oath of the party who made them, they are admissible in evidence, though the party making them can remember and testify nothing as to the facts contained therein. The paper must be an original one, made at the time the facts contained in it are alleged to have taken place, and confirmed by the oath of the witness, that he believes it contains a true statement of the facts. The true criterion appears to be this, as to the admissibility of the entries, whether, after the death of the maker of them, they would be admissible; if so, when verified by the oath of the party, they are also admissible. The same principle is announced in *Halsey v. Sinnebaugh*, 15 N. Y. 488, and *Moots v. State*, 21 Ohio St. 653; *Newell v. Houlton*, 22 Minn. 19.

The conclusion to be reached from the authorities cited may be stated as follows: Original entries made in the regular course of business by a third person, and, in some jurisdictions, by the party in interest himself, are admissible in evidence after his death, insanity, or absence from the state, upon proof of his handwriting. If the person who made the entries is alive and within reach of the process of the court, he must be called to authenticate them.

A PARTY'S OWN BOOKS SUPPORTED by his oath are now generally received in evidence in support of his claim. This rule is a departure from the common law prohibition against testifying in one's own behalf, but has been adopted in most of the states, either by statute or by the force of judicial decision: 1 Greenl. on Ev., sec. 118, and note (1); 1 Wharton on Ev., sec. 678. As is said in *Nichols v. Haynes*, 78 Pa. St. 174, 176, speaking of the act making the parties witnesses: "Now, the party himself is a competent witness, and may prove his own claim as a stranger would have done before the act of 1869. That the facts contained in the book, either of charge or discharge of cash or goods, or whatever else is in his personal knowledge, might be proved by a stranger, no one doubts. A clerk, for instance, could prove the account, including cash items from his own knowledge, and might use the book to refresh his memory. The party now stands by force of the act on the same plane of competency as the stranger stood upon, and, therefore, may make the same proof as a stranger could." Therefore, it is conceived, that in those states, where the disability of a witness, by reason of interest, is removed, the same general rules regarding the admissibility of original entries and memoranda to refresh the memory, must prevail, as has been applied to the case of third persons.

In Maryland, however, notwithstanding the legislature has enacted that all parties are competent witnesses without regard to their interest in the matter in question, Chief Justice Bartol, pronouncing the court's opinion in *Romer v. Jaeksch*, 39 Md. 585, says that the rule of the common law relative to entries has not been departed from in that state; that it applies to entries when made by a clerk or other disinterested party only, and that the act removing the bar of a party's interest, cannot be construed as applying to any cases "except those of witnesses testifying under oath, and subject to the test of cross-examination." The case then before the court manifests the strictness with which this interpretation of their laws on the subject is enforced. The entries sought to be introduced were made by a deceased partner of the plaintiff.

There are certain qualifications, limiting the kind of entries, which are admissible within the view of the subject heretofore taken; and they are, that the entries be in a book of original entry; that they be made at the time the transactions, to which they refer, took place; that they be made in the course of business, and that they be made by persons having personal knowledge of the facts.

THE BOOKS MUST BE BOOKS OF ORIGINAL ENTRY.—They must be the first permanent transcript of the act to which they relate: *Woodbury v. Woodbury*, 50 Vt. 152; *Kotwitz v. Wright*, 37 Tex. 82; *Wall v. Dovey*, 60 Pa. St. 212; *Lawhorn v. Carter*, 11 Bush, 7. The ledger or other book into which the entries have been copied from the day-book or memorandum of sales and credits is not an original entry: *Woodbury v. Woodbury*, 50 Vt. 152; *Wall v. Dovey*, 60 Pa. St. 212. But the fact that the charges, in the first instance, were made on rough pieces of paper or on a slate, and were subsequently transferred to the book offered on the trial, does not destroy the character of such book as one of original entries. The distinction taken is, that the slate minutes are mere memoranda to assist the memory until the items are transferred to the books, and are not intended to be permanent: *Faxon v. Hollis*, 13 Mass. 427; *Pillsbury v. Locke*, 33 N. H. 96, and cases cited; *Hall v. Glidden*, 39 Me. 445; *Stroud v. Tilton*, 3 Keyes, 139; *Sickles v. Mather*, 20 Wend. 72; *Davison v. Powell*, 16 How. (N. Y.) 467; *Landis v. Turner*, 14 Cal. 575; *Hartley v. Brooks*, 6 Whart. 189; *Ingraham v. Bockius*, 11 Am. Dec. 730, and note reviewing the Pennsylvania authorities on the subject of original entries. The rough memoranda, although in existence, need not be produced in evidence; that fact not of itself making the book into which they have been copied secondary evidence: 1 Whart. Ev., sec. 682. The time within which the transfer from the slate or jottings should be made is differently stated. The Pennsylvania rule is strict, requiring that the permanent record should be made not later than two days after the slate entry. In other states it has been held that if the transfer had been "long delayed," that circumstance without satisfactory explanation would constitute a valid objection to the admission of the book: *Landis v. Turner*, 14 Cal. 576. The lapse of from two to four weeks before the entries were transcribed, was held not to render the book incompetent, in *Hall v. Glidden*, 39 Me. 445. Where the books produced were proven to be the "only books" of the deceased, such proof was held equivalent in *Patrick v. Jack*, 82 Ill. 81, to prove that they were books of original entry, the court saying, per Judge Scott, "Evidence that they were the 'only books' kept by the decedent in his business, is sufficient proof of that fact. Any other conclusion would be an absurdity."

THE ENTRIES SHOULD BE MADE AT THE TIME THE TRANSACTION OCCURRED, OR AS SOON AFTER AS IS CONSISTENT WITH THE COURSE OF THE BUSINESS. The entry

need not be made exactly at the time of the occurrence; it suffices if it be within a reasonable time, so that it appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived, unimpaired. If done at or about the time, it is sufficient: *Jones v. Long*, 3 Watts, 325; *Hall v. Glidden*, 39 Me. 446. The law fixes no precise time when the entry should be made. It is enough if it be made "at or near the time of the transaction:" *Curren v. Crawford*, 4 S. & R. 3, 5; 1 Greenl. Ev., sec. 117, note; Wharton on Ev., sec. 683. See, also, the cases cited under the previous head.

ENTRIES IN COURSE OF BUSINESS.—It is also essential that the entries should be made in the regular course of one's business, duty, or employment: *Shoemaker v. Kellog*, 11 Pa. St. 310. A single, independent item will not render the book wherein it is written one of original entries: *Karr v. Stivers*, 34 Iowa, 123; nor a recent entry in an old book of accounts, that has been laid aside, and used only for the entry in question: *Kibbe v. Bancroft*, 77 Ill. 18.

The book, to be admissible, it is said, in *Hart v. Livingston*, 29 Iowa, 217, must be a registry of business actually done, and not of orders, executory contracts and things to be done subsequent to the entry, and in support of this announcement are cited: 1 Greenl. Ev., sec. 118, note 1; *Morse v. Potter*, 4 Gray, 292; *Fairchild v. Dennison*, 4 Watts, 258; *Winsor v. Dillaway*, 4 Met. 221; *Earle v. Sawyer*, 6 Cush. 142. The principle was applied to a book offered to show how many hogs had been sold to plaintiff, and at what price. The entry was: "Bo't of Livingston, twenty-five fat hogs; twelve head delivered immediately, balance when fattened; pd. \$15.00;" and the book containing it was rejected. The doctrine is re-affirmed in *Whisler v. Drake*, 35 Iowa, 103.

PERSONAL KNOWLEDGE OF THE TRANSACTION, on the part of the one making the entry, is also essential: *Chaffee v. United States*, 18 Wall. 541; *Marsh v. Case*, 30 Wis. 531; *Luce v. Doane*, 38 Me. 478; *Long v. Conklin*, 75 Ill. 32; *Peters v. Gallagher*, 37 Mich. 407.

THE BOOKS SHOULD BE REGULAR ON THEIR FACE.—"When a book of original entries is offered in evidence, supported by the oath of the party, the court examines to see if it appears, *prima facie*, to be what it purports to be. If there are erasures and interlineations, and false or impossible dates, touching points that are material, or if for any reason it clearly appears not to be a legal book of entries, the court may reject it as incompetent: *Churchman v. Smith*, 6 Whart. 146; *Curren v. Crawford*, 4 Serg. & R. 3. If this does not clearly appear, it is to be submitted to the jury to judge of, and then it is competent for the adverse party to show its general character by pointing to charges and entries affecting other parties, and by calling witnesses to prove such entries false and fraudulent. That this investigation may not run into excessive departure from the issue on trial, the court should limit it to the time, or near the time covered by the account in suit, and should suffer no more examination of collateral cases than would bear directly on the general character of the book:" *Funk v. Ely*, 45 Pa. St. 444, 448. A clear exposition of the law, as existing in Mississippi, is made by Judge Ellett, in *Moody v. Roberts*, 41 Miss. 74, 77. After a review of the various rules and reasons enunciated in different jurisdictions, his honor proceeds: "We will state what we apprehend to be the proper rule on the subject. When direct proof of a claim for goods sold, or for services rendered, can not be made by the oath of the party, or of other witnesses, the books of account of the party are admissible, not as conclusive evidence of the claim,

but as testimony tending to establish it, the credit of which is to be weighed by the jury. The competency of the books as evidence in the particular case, is a question for the court, and in order to justify their reception it must appear that they are the regular books of account of the party, containing the original entry of his transactions from day to day in the regular course of his business, and made at or near the time of the transactions to be proved, and that they are fairly and honestly kept. The entries must purport to be made with a view to charge the opposite party, and alterations and additions in the account made on, apparent on their face, must be satisfactorily accounted for. No mode is prescribed by law in which a book must be kept to make it evidence, and the question of competency must be determined by the appearance and character of the book, regard being had to the degree of education of the party, the nature of his employment, the manner of his charges against other people, and all the circumstances of the case; and it will not be evidence of any charge not within the regular course of the business of the party, nor of any fact that may arise collaterally in the case."

The fact that the books do not contain any reference to the transaction in dispute, can not be urged as evidence that the alleged transaction never took place. The entries are not admissible to establish a negative proposition: *Lashorn v. Carter*, 11 Bush, 7; *Morse v. Potter*, 4 Gray, 292; *Mattocks v. Lyman*, 18 Vt. 98.

McMECHAN v. GRIFFING.

[3 PICKERING, 149.]

AN UNRECORDED DEED, as between the parties, passes the estate immediately on its delivery; and upon being recorded, relates back to the time of its delivery, to all intents and purposes, unless the grantor has, in the meantime, made a conveyance to a subsequent *bona fide* purchaser, or the property has been attached or otherwise incumbered.

NOTICE OF AN UNRECORDED DEED binds a purchaser to the same extent as a registry thereof, for the taking of a legal estate after notice of a prior right makes a *mala fide* purchaser.

NOTICE may be either express or implied.

EXPRESS NOTICE must be shown by clear and unequivocal proof.

IMPLIED NOTICE of an unrecorded deed arises when an entry is made under the deed and is succeeded by visible improvement of the land, and taking the profits thereof.

POSSESSION UNDER AN UNRECORDED DEED, if open and notorious, is generally sufficient to raise a presumption of notice; but the change of possession must be visible. If one who is the owner and in possession of a part of a lot of land, purchase the residue (there being no partition fence), and do nothing after the purchase but repair the fence around the lot, depasture cattle in it, sell some trees and remove an old hovel, these facts are insufficient to charge a subsequent purchaser with notice.

ENTRY *sur disseisin*. The demandant and tenant both derived title under one Timothy Griffing, the former by virtue of a writ of execution under an attachment levied upon the tract of land

in question, in May, 1822. The tenant Martin and Timothy were brothers. Their father died in 1820, leaving the demanded premises and other realty to his five children. On the ninth of May, 1821, the children made an amicable division of the property, and executed to one another quit claim deeds for the several parcels. Timothy on the same day executed to Martin a deed for his, Timothy's, share, including the premises in question, but this deed was not recorded until July, 1822. The tenant alleged that he had held the continued, open, peaceable and exclusive possession of this lot ever since the date of the deed, and was in such possession at the time the attachment was levied. In support of this allegation, the tenant introduced witnesses who testified that the partition among the children was well known among the neighbors, and also that Timothy had conveyed his land to Martin; that the tenant had repaired the fence about the lot bought of Timothy, and depastured his cattle on that lot; had cut wood himself therefrom, and had sold some of the timber to others, and that Martin, and no one else, had improved the land ever since the making of the deed.

The demandant offered evidence to prove that he had no actual notice of the prior conveyance, when he attached, and that the land was remote from observation. It was agreed that the Timothy tract was not divided by any fence from the portion assigned to the tenant; that the greater part of the pastureland was in the latter portion, the other being principally woodland, and that after the conveyance, Timothy returned to New York, where he resided, and had never since claimed the possession nor profits of the conveyed tract.

The only question at the trial was, whether the tenant, at the time of the attachment, had implied notice of the unregistered deed. The jury were instructed, that if the tenant took possession of the conveyed tract, immediately under the deed, and had continued in the open, peaceable and exclusive possession thereof up to the time of the attachment, such possession was, in law, implied notice of the deed. The jury found for the tenant.

E. H. Mills and Dewey, for the demandant, moved for a new trial.

Jarvis, contra.

By Court, *WILDE, J.* By the provincial statute of 9 Will. III, c. 7, it is provided that no bargain, sale, or mortgage, or other conveyance of houses or lands, made and executed within this

province, shall be good and effectual in law to hold such houses or lands against any person or persons, but the grantor or grantors, and their heirs only, unless the deed or deeds thereof be acknowledged and recorded.

A provision nearly similar is contained in St. 1783, c. 37, directing the mode of transferring real estates by deed, and for preventing fraud therein. It is said that it was formerly held by some that under the provincial statute the estate did not pass until the registry of the deed, but it was at an early period determined, and has long since been settled as undisputed law, that the estate, as between the parties, passed immediately on the delivery of the deed; and that when recorded, the deed was rendered valid from the beginning, by relation back, to all intents and purposes, unless the grantor, in the meantime, should have conveyed the estate to a subsequent *bona fide* purchaser, or it should have been attached, or otherwise incumbered as his property. It was also determined, and it is equally well settled as the sound construction of the statute, that, as the registry was designed only to give notice, and thereby to prevent purchasers being imposed upon by prior conveyances, any notice of the first conveyance to a subsequent purchaser, before his purchase, is equivalent to the registry of the deed: Trowbridge's Reading on the Statute, 3 Mass. 573. If the subsequent purchaser thus affected with notice should nevertheless complete his purchase, intending to get his deed recorded before the first purchaser, and thereby to hold the estate, it would be a manifest fraud upon the first purchaser, and therefore void as to him. "Valid transactions, as between the parties," says Lord Mansfield, "may be fraudulent by reason of covin, collusion, or confederacy to injury a third person: for instance, A. buys an estate from B., and forgets to register his purchase deeds; if C., with express or implied notice of this, buys the estate for a full price, and gets his deeds registered, this is fraudulent, because he assists B. to injure A.:" *Worseley v. De Mattos*, 1 Burr. 474. C.'s deed, in the case supposed, being fraudulent, can not be set up against A., who afterwards gets his deed recorded, without supposing, what can never be supposed, that the statute was intended to sanction fraud.

In the case of *Le Neve v. Le Neve*, Lord Hardwicke says: "That the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser. This is a species of fraud, and *dolus malus* itself; for he knew that the first purchaser had the clear right of the estate, and after knowing that,

he takes away the right of another person by getting the legal estate. And this exactly agrees with the definition of the civil law of *dolus malus*: Dig., lib. 4, tit. 3, lex. 2. Fraud, or *mala fides*, therefore, is the true ground on which the court is governed in cases of notice:" 3 Atk. 654.

On this ground numerous cases have been decided both in this country and in England, and the principle is too well supported by authority, and too clear, to admit a reasonable doubt: *Jackson v. Sharp*, 9 Johns. 168 [6 Am. Dec. 267]; *Farnsworth v. Childs*, 4 Mass. 637 [3 Am. Dec. 249]; *Norcross v. Widgery*, 2 Id. 506; *Davis v. Blunt*, 6 Id. 489 [4 Am. Dec. 168]; *Prescott v. Heard*, 10 Id. 60; *Jackson v. Burgott*, 10 Johns. 457 [6 Am. Dec. 349]; *Dey v. Dunham*, 2 Johns. Ch. 190.

To determine what notice is sufficient to supply the place of a prior registry, is more difficult. The notice, say the authorities, must be either express or implied. As to express notice, it has been uniformly held that the proof must be clear and unequivocal. "Suspicion of notice, though a strong suspicion," says Lord Hardwicke, in the case of *Hine v. Dodd*, 2 Atk. 275, "is not sufficient to justify the court in breaking in upon an act of parliament." In that case, which depended upon the registry act, 7 Anne, c. 20, there was proof that the defendant acknowledged notice of the plaintiff's judgment prior to the execution of the mortgage set up by the defendant, but as he in his answer swore to his belief that he had not notice, the proof was held to be insufficient. So in the case of *Jackson v. Given*, 8 Johns. 107 [5 Am. Dec. 328], it was proved that Williams, under whom the defendant claimed, had said, in a conversation with a third person, about the time of the purchase, that "he had understood that Umphrey (his grantor) had fooled away the lot, and had sold it several times, and did not consider it worth his trouble to look about it." And it was decided that this conversation was too loose to justify the inference of notice. Chief Justice Kent cites with approbation the decision of Lord Hardwicke in the case of *Hine v. Dodd*; and the same is much approved of likewise in the case of *Jolland v. Stainbridge*, 3 Ves. jun. 478. In the case of *Norcross v. Widgery*, Chief Justice Parsons says that: "When a prior conveyance, not recorded until after one of a subsequent date, is attempted to be supported on the ground of fraud in the second purchaser, the fraud must be very clearly proved:" 2 Mass. 509. This remark applies as well to implied as to express notice. The principle is the same in both. The fact of notice must be

proved by indubitable evidence, either by direct evidence of the fact, or by proving other facts, from which it may be clearly inferred. It is not in such case sufficient that the inference is probable, it must be necessary and unquestionable. The general rule in respect to implied notice is correctly laid down by Justice Trowbridge, though like all general rules, it admits, I apprehend, of some exceptions. "If," says he, "one seised in fee of land, for a valuable consideration, by deed, bargains and sells the land to another in fee, the deed gives the bargainee a right to enter, and when he enters by force of that right, he then is possessed of the land, and complete tenant in fee; and such entry, being followed by a visible improvement of the land, and taking the profits thereof, is such an evidence of an alteration of the property, as will amount to implied notice thereof:" 3 Mass. 575. Such a possession without the deed would amount to a disseisin, and nothing short of this can amount to implied notice. It is obvious that this is the opinion of Justice Trowbridge, and he certainly extends the doctrine of implied notice to its utmost legal limits.

He admits that the statute will have effect, "not only where the bargainee, without recording his deed, suffers the bargainor to remain in possession, but also where land lying waste is sold, and the purchaser neither records his deed, nor enters and makes a visible improvement:" 3 Mass. 581. But it is not always true that a possession, which, if adverse, would constitute a disseisin, would, under a deed not recorded, amount to implied notice. The cases depend on different principles. By a maxim of the common law for the avoidance of maintenance and stirring up of suits, no right of entry or re-entry can be granted or assigned to a third person. And if a disseisee makes a grant of the land, it is immaterial whether the grantee has notice of the disseisin or not. But when a grantee or bargainee records his deed, and a prior deed, not registered, is set up to defeat his title, notice of such prior deed is not only material, but is indispensable to give it validity. The first deed is void, by the statute, as to the subsequent purchaser, and the possession under it does not amount to a disseisin, because the possession is not adverse nor tortious. If, therefore, the subsequent purchaser is not affected by notice, he has priority by virtue of the registering of his deed, and the express provision of the statute.

I admit that generally the open and notorious possession of the first purchaser under his deed would be sufficient to raise a

legal presumption of notice. But suppose that a lessor should grant the fee of the land to the lessee, he being in possession under the lease, and the next day should make a second grant to a third person, who well knew that the lessee the day before was in possession under the lease, how does his continued possession furnish evidence of notice of his purchase? To imply notice in such a case, is to presume a fact without proof and against probability.

But the present case does not require us to consider this or any other exceptions to the general rule; for we are of opinion that nothing appears by the evidence which will warrant the application of the rule itself. There is no evidence to show that the tenant, at the time of the attachment, or at any time previous, had the open, visible possession and improvement of the premises. If there had been no deed from Timothy, the possession of the tenant would not have been such as to have constituted a disseisin. The repairing of the fence, setting aside the deed, would have been neither a disseisin nor a trespass. This was an ancient fence, and inclosed the lots as a general field, there being no partition fence between the allotments to Martin and Timothy; and as Timothy improved no part of his allotment, which was principally woodland, he was not bound to repair the fence, nor had a right to prevent Martin from repairing it, so as thereby to leave his field exposed to cattle: *Vide* St. 1785, c. 53, concerning general and common fields, sec. 12. Nor was the depasturing of the small strip of improved land included in Timothy's allotment either a disseisin or a trespass. The tenant had a right to turn his cattle into his own pasture; and if they strayed into Timothy's portion of the pasture, it was no trespass. As to cutting the trees and removing the old hovel, they were mere trespasses, supposing there had been no deed from Timothy. The deed from Timothy was not followed by any apparent change in the possession. If it had not been made, no doubt the visible possession and occupation would have remained the same. The old fence would not have been removed, and there would have been no partition fence, for it would have been useless. To Martin it would have been an expense without profit; and it could have been of very little profit to Timothy. The little strip of cleared land which fell to his share, could not have been made to yield a profit equivalent to the expense of fencing it. The tenant's possession, therefore, considering the attending circumstances, is hardly sufficient to put a party upon inquiry, and is very slight ground for implied notice of a prior deed.

We are, therefore, of opinion that there is no legal presumption of notice arising from the facts in the case, and that the verdict can not be sustained.

We have been led to this conclusion without considering the evidence on the part of the demandant. That evidence is very strong to negative the fact of notice. Whether, if the possession had been such as to raise a legal presumption of notice, it might not be rebutted by other evidence, is a question upon which we give no opinion.

Verdict set aside and a new trial granted.

PALMER v. STEBBINS.

[3 PICKERING, 128.]

CONTRACT IN RESTRAINT OF TRADE, made on good consideration, and not extending beyond the obligee's sphere of actual business, is valid. A condition in a bond that M. shall cease to have any concern in the business of boating on the Connecticut river, and shall give the obligees all the freighting of his goods at customary price, etc., and shall not directly or indirectly aid, countenance or promote any other boatman, is not void.

DEBT on a bond conditioned for the payment of six hundred dollars. The condition was as follows: "If the said Miner shall from this time cease to have any concern in the business of boating on Connecticut river, and shall give them all the freighting of his goods, wares and merchandise up and down Connecticut river, at the customary freight, and to be paid in goods at the usual price, and shall aid and countenance them in their business, and shall not directly or indirectly promote any other boatman to compete with them in the business of boating, then the bond to be void," etc.

The defendant pleaded performance; reply, assigning breaches. Demurrers were then interposed which were waived on the argument.

E. H. Mills, Rice and J. H. Ashmun, for the defendant, contended that the bond was void, being in restraint of trade: *Mitchel v. Reynolds*, 1 P. Wms. 181; *Pierce v. Fuller*, 8 Mass. 223; *Chesman v. Nainby*, 2 Str. 739; *Clerk v. Comer*, Cas. 1, H. 48; *Davis v. Mason*, 5 T. R. 118; *Colgate v. Batchelor*, Cro. Eliz. 872

Dwight and Bliss, jun., *contra*, urged that contracts restricting trade within reasonable bounds were not void: *Gunmaker' Company v. Fell*, Willes, 384; *Davis v. Mason*, 5 T. R. 118; *Bunn*

v. *Guy*, 4 East, 190; *Pierce v. Fuller*, 8 Mass. 223 [5 Am. Dec. 102]; *Perkins v. Lyman*, 9 Id. 522; *Stearns v. Barrett*, 1 Pick. 443 [11 Am. Dec. 223].

By Court, WILDE, J. [after stating the facts]: So that the only question is, whether the breach is well assigned and whether the condition, as to this part of it, is valid in law, for it is admitted that if it is, it is not vitiated by any illegality in the other stipulations in the condition. The question then is, whether any agreement which may be supposed to discourage competition in trade, is unlawful, and is such a restraint of trade as is inconsistent with public policy.

In the case of *Mitchell v. Reynolds*, 1 P. Wms. 181, Parker, C. J., lays down the reasons why restraints of trade are not allowed. "The true reason," says he, "of the distinction upon which the judgments in these cases of voluntary restraints are founded, are: First. The mischief which may arise from them, first to the party, by the loss of his livelihood, and the subsistence of his family; secondly, to the public, by depriving it of a useful member.

"Another reason is, the great abuses these voluntary restraints are liable to, as, for instance, from corporations, who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible. As likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, were they to set up for themselves.

"Thirdly. Because, in a great many instances, they can be of no use to the obligee, which holds in all cases of general restraint throughout England, for what does it signify to a tradesman in London, what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other.

"Fourthly. The fourth reason is in favor of these contracts, and is that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade."

These are the principal reasons given for the rules of law, in respect to the restraint of trade by voluntary contract, and nothing important can be added from the later cases on the subject. They were collected to a recent date by Chitty in his Digest of laws relating to commerce, and none of them have much bearing upon the question under consideration.

It must therefore be decided on general principles, rather than by express authority. Whether competition in trade be useful to the public or otherwise, will depend on circumstances. I am rather inclined to believe, that in this country at least, more evil than good is to be apprehended from encouraging competition among rival tradesmen or men engaged in commercial concerns. There is a tendency, I think, to overdo trade, and such is the enterprise and activity of our citizens that small discouragements will have no injurious effect in checking in some degree a spirit of competition. An agreement with a tradesman to give him all the promisor's custom or business upon fair terms, and not to encourage a rival tradesman to his injury, can hardly be considered as a restraint of trade. Certainly it is not such a restraint as would be injurious to the public, for in proportion as it discourages one party it encourages another. As to the public therefore such a contract *est indifferenter*. It would be extravagant to suppose that any one, by multiplying contracts of this kind could obtain a monopoly of any particular trade. But admitting that such a contract is a restraint of trade, yet it is clearly a limited restraint, and is not binding by the terms of it beyond the sphere of the obligee's actual business. Such a particular restraint made by voluntary contract on good consideration, is valid in law, and the consideration appearing by the condition in this case is as we think a reasonable one, and sufficient to support this part of the agreement. The plaintiffs agreed on their part to do all the defendant's freighting up and down Connecticut river, at the customary freight, and to be paid in goods at the usual price. This agreement on the plaintiff's part is to be inferred by their acceptance of the bond, in which the defendant agrees to give them his freighting, and to aid and countenance them in the business of boating, and not to promote any other boatman to compete with them in the business of boating. This seems to be a fair and equal bargain, founded on a good and adequate consideration. If there is any inequality, the hardship and inconvenience are evidently on the part of the plaintiffs, who are bound to be ready at all times to take the defendant's freight, however inconvenient it may be to them so to do.

But it is said that this is a useless and unnecessary contract, and therefore not to be enforced by law; that the plaintiffs have not shown in the pleadings any actual damages. But the plaintiffs in assigning a breach are not obliged to set out their claims for damage; it is sufficient to assign a breach, and the

breach is in substance well assigned; if there be any formal defect it cannot be taken notice of on general demurrer.

As to the first branch of the condition we do not decide. That may be the subject of further consideration on a hearing in chancery, in which case it may be necessary to ascertain other facts than those appearing on the pleadings. One fact in particular appears to be important, namely, whether the plaintiffs are in fact engaged in boating up and down the river co-extensively to the terms of the condition. If not, the question will arise, whether a restraint can be valid which can be of no use to the plaintiffs, and which may be prejudicial to the rights of the defendant.

Replication adjudged good.

WHITING v. EARLE.

[3 PICKERING, 201.]

WAIVER OF RIGHT TO EARNINGS OF A MINOR.—If a minor son makes a contract for his services on his own account, with the knowledge and without the objection of his father, there is an implied assent that the minor shall have his earnings.

ACTION against John Earle, principal, and Howard, trustee, to subject certain moneys in the latter's hands due to Enoch Earle, a minor son of John, to the payment of Whiting's claim against John. Howard answered that he had hired Enoch, then a minor living with his father, at the rate of one dollar a day and board; that at the time of the service of the writ, he owed Enoch forty-eight dollars for wages and board; that the contract of hire was made with Enoch. In answer to interrogatories put by the son, who moved to be made a party to the suit, Howard replied that the father, since the service of the writ, had told him he had given his son his time before Howard employed him, and had relinquished all right to Enoch's earnings; and that Enoch had supported himself, and had paid his father for his board.

A. Denny, contended that a father's right to a son's services was not lost by his neglect to support his son, nor by permitting him to make a contract for such services; that there was no evidence of an assignment of the son's earnings, and that such an assignment would have been fraudulent as against the father's creditors: *Benson v. Remington*, 2 Mass. 113; *Nightin-*

gale v. Withington, 15 Id. 272 [8 Am. Dec. 101]; *Jenney v. Alden*, 12 Id. 378; *Reeve's Dom. Relat.* 291.

J. Davis and Allen, contra.

PARKER, C. J., said, in substance, that although the general principle is clear that a father is entitled to the earnings of a son while under age, yet the court thought it equally clear that he might transfer to the son the right to receive them. This is necessary for the encouragement of young men; and it is often convenient for a father wishing to be relieved from the burden of supporting his son, to allow him in this manner to support himself. Where such contract is entered into without any fraud for the advantage of the son, on the principles of common justice, and according to decided cases, he is entitled to the profits of his own labor. We go so far as to say that where a minor son makes a contract for his services on his own account, and the father knows of it, and makes no objection, there is an implied assent that the son shall have his earnings.

Trustee discharged.

COOK v. HULL.

[3 PICKERING, 208.]

WATER, RIGHT TO DIVERT. — If water has been used for more than forty years for the purpose of driving a mill, the owner of land bordering on the stream has no right to divert the water so as to impede the operation of the mill.

CASE for diverting water from the plaintiff's mill. Plea, the general issue, and verdict for the plaintiff. The case appears from the opinion.

Stearns and T. Bigelow, for the defendant, in support of a motion for a new trial, cited *Weston v. Alden*, 8 Mass. 136; *Thurston v. Hancock*, 12 Id. 220 [7 Am. Dec. 57]; 3 Dane's Ab. 16.

Hoar, contra, cited *Colburn v. Richards*, 13 Mass. 420 [7 Am. Dec. 160]; *Brown v. Best*, 1 Wils. 175; *Bealey v. Shaw*, 6 East, 208.

By Court, PARKER, C. J. There can be no doubt that the verdict is right in principle. The plaintiff had enjoyed the use of water for the purpose of driving his mill for more than forty years. The defendant had enjoyed the use of the same stream after it left his own mill, situated above the plaintiff's

mill, for the purpose of irrigating his lands; but in 1817, to increase the privilege for the benefit of his lands, he took the water from its usual channel by means of a ditch which conveyed it so far through his lands as by absorption and evaporation to diminish the quantity which before that time came to the plaintiff's mill, so materially as to injure and stop his works. The right to do this is claimed by the defendant as resulting from the decision of this court in the case of *Weston v. Alden*. There is a material difference between that case and the one before us. The plaintiff Weston had not erected any mill; the injury complained of was only that less water came through his land than used to flow before the defendant made his sluices, and the damage complained of was only the natural consequence of the lawful use of the water by the defendant. It did not appear that the plaintiff, or those before him in the estate, had erected any work of art upon the stream, or had appropriated the water running through his land by any artificial means. Whereas, in the case before us the plaintiff, and those whose estate he holds, had erected and maintained mills at great expense, and they could be profitably used only by enjoying the customary flow of water, and this use had been acquiesced in by the defendant, and those who preceded him in his estate, for more than forty years.

The plaintiff's counsel in this case seemed to admit that if the case of *Weston v. Alden* is law, they had no right of action, and relied upon the case of *Colburn v. Richards* as having overruled it; but we do not consider this latter case in that light. The circumstances were materially different, particularly in this, that in the case of *Colburn v. Richards*, the defendant, who was sued for removing the dam, had a grist-mill which had stood fifty years, the working of which was impeded by the measures taken to irrigate his land. The two cases may well stand together, and the latter of the two governs the case now before us.

Judgment according to the verdict.

WHITE v. HALE.

[3 PICKERING, 291.]

JOINT DEBT.—An acknowledgment by one of several joint debtors will, as against all, take the debt out of the statute of limitations.

ASSUMPSIT for money had and received. Plea, the statute of limitations. The money had been borrowed by the agent of the

defendants in 1814, then a voluntary association; and to take the case out of the statute, plaintiff proved an acknowledgment of the debt by two of the defendants within six years. Verdict for the plaintiff.

Merrick, for the defendants, contended that the contract was entire, and to take the case out of the statute, it should be proved that all the defendants promised: *Bland v. Haselrig*, 2 Vent. 151; *Baxter v. Penniman*, 8 Mass. 134.

W. Baylies and H. Cushman, *contra*, to show that the acknowledgment of one joint debtor is sufficient, cited *Smith v. Ludlow*, 6 Johns. 267; *Johnson v. Beardslee*, 15 Id. 3; *Whitcomb v. Whiting*, 2 Doug. 652; *Jackson v. Fairbank*, 2 H. Bl. 340; *Wood v. Braddick*, 1 Taun. 104.

By Court, PARKER, C. J. There was competent evidence for the jury to find a new promise upon, provided the acknowledgment by Nichols, and one other, is sufficient to charge the whole of the company; and we think the authorities cited by the plaintiff's counsel clearly maintain that position. The case cited from Ventris is not of a different character. The case is, if *indebitatus assumpsit* be brought against four persons, all of whom plead the statute of limitations, and the jury find that one promised within six years, there can be no judgment against him. And this is, because the verdict does not pursue the issue; and besides, the contract being joint, all or none should be charged. The fault was in not considering the promise of one as binding upon all. This is explained in a note to the case cited from Douglas.

Judgment according to the verdict.

PIERCE v. PIERCE.

[3 PICKERING, 299.]

A DIVORCE WILL BE DENIED, even on the ground of adultery, if the wrongful act was caused by the complainant.

LIBEL for a divorce *a vinculo* for the adultery of the wife. The opinion states the case.

W. Baylies, Parsons and Russell, for the libellant.

H. Cushman and P. B. Hunt, *contra*.

PARKER, C. J. A majority of the court are against granting a divorce. One instance of adultery was proved, but there is

reason to think that the husband was the cause of its being committed. It would be a dangerous principle to establish that a husband who has suspicions of the infidelity of his wife shall be allowed to lay a train which may lead her to the commission of adultery, in order that he may take advantage of it to obtain a divorce. As we are clear that the adultery proved was committed with the knowledge and consent of the libellant, and probably with his connivance, a divorce will not be granted.

DEFENSES IN DIVORCE—MISCONDUCT OF PLAINTIFF.—It is a well-established principle that conduct on the part of the plaintiff, amounting to a conniving at the act urged as a ground for granting a divorce, will be a good defense to the action: 2 Bishop on Mar. and Div., sec. 5 *et seq.* The defense of connivance occurs most frequently in suits to dissolve the marriage relation for adultery, but is available in all divorce causes. The uncertainty among the decisions prevails, however, not where there has been positive connivance, but where the conduct of the complainant has been such as to provoke the act complained of, although such conduct may not have been planned with a view to take advantage of the commission of the act in proceedings for a divorce. It may be stated as settled, at least in this country, that if the complaining party has violated the marriage contract to the extent that the violation would constitute a good cause for a divorce, this fact may be set up as a defense on the principle of recrimination: 2 Bishop on Mar. and Div., ch. 5. So far as the matrimonial contract is concerned, the courts cannot distinguish between the breaches thereof, furnishing grounds for divorce, whatever difference there may be in a moral point of view; therefore, the several offenses declared by statute to constitute such grounds are equally pleadable in bar to the action: *Conant v. Conant*, 10 Cal. 249, 256; *Neagle v. Neagle*, 12 Mo. 53. So willful desertion for a time, sufficient to create a cause for divorce, may be pleaded in bar to an action brought for the adultery of the defendant: *Hall v. Hall*, 4 Allen, 39; *Clapp v. Clapp*, 97 Mass. 531. Adultery may be pleaded in bar to a charge of cruelty: *Holmes v. Holmes*, Walk. 474; *Johns v. Johns*, 29 Ga. 718; and adultery to a charge of adultery: *Smith v. Smith*, 4 Paige, 432; *Flavell v. Flavell*, 5 C. E. Gr. 211.

Where the plaintiff has been so guilty that his conduct could be made the basis of an action for divorce, there is little or no conflict in the application of the principles of recrimination. But it is upon the misconduct of the plaintiff, not glaring enough to make a foundation for divorce proceedings, yet in itself wrongful and leading to the commission of the defendant's error, that the courts are conflicting, when such misconduct is relied upon as a defense. In *Grove's Appeal*, 37 Pa. St. 443, 447, a bill was filed by the wife for a divorce from the bonds of matrimony, on the ground that her husband had turned her out of doors, and had refused to allow her to return and live with him. A plea of justification was interposed, concerning which the court, per Strong, J., said: "If there be a justification of this act done by the husband, it must be found in the passionate conduct of the libellant, her unkind treatment of her step-children, and her inexcusable departure from her home about the middle of September, 1856. We make no attempt to apologize for these things. Admitting all their culpability as fully as it is shown in the testimony, the question still remains, do they justify the husband in

turning his wife out of doors? We can not say that they do. Nothing less will answer for a justification than that which would be a sufficient cause for a divorce at the suit of the husband. We have adopted the same principle which rules in the English ecclesiastical courts. In that country, when cohabitation is suspended by either the husband or wife, of his or her own notion, without a sufficient reason, a suit for restitution of conjugal rights may be maintained by the injured party. Nothing amounts to a bar against such a suit, except such facts as would entitle the defendant to a divorce: *Olive v. Olive*, 1 Haggard Con. R. 361; *Dysart v. Dysart*, 1 Robertson's Ec. 106. Nothing short of such facts will justify a willful separation or a continuance of it. The interests of society, the happiness of the parties, and the welfare of families, demand such a rule. Separation is not to be tolerated for light causes, and all causes are light which the law does not recognize as ground for the dissolution of the marriage bond. We are constrained, therefore, to hold that the respondent had no sufficient cause for turning his wife out of doors, or refusing to permit her to return when, repentant, she desired to do so." And in *Butler v. Butler*, 1 Para. Sel. Cas. 329, where the question was very ably considered, it was decided that that only was a reasonable cause justifying a husband or wife in abandoning each other, which would entitle the injured party to a divorce.

Such, also, is the law of Kentucky, where the justification of cruelty was set up to the wife's bill for a divorce on the ground of desertion. The cruelty referred to was examined by the court and pronounced insufficient to maintain an action for divorce on the husband's part. Whereupon, Robertson, C. J., says: "That acts or words which would not authorize a separation by decree, could not furnish a legal excuse for voluntary abandonment. The same principle of policy and rule of law apply with equal effect to the personal and judicial remedy." Proceeding upon the same principle, are: *Moore v. Moore*, 16 N. J. E. (1 C. E. Gr.) 275.

On the other hand, the misconduct of the party seeking a divorce has been regarded as contributing to, or being the cause of the wrongful acts of the defendant, and the petition has been denied in instances where that misconduct would not itself be a ground for divorce. In *Moss v. Moss*, 2 Ired. 53, the abandonment and desertion of the wife by the husband were held sufficient to deny his bill for her adultery committed subsequent to the abandonment. The court say: "By his own unfounded accusation and cruel expulsion of his wife from his roof, he probably may have caused the 'criminal fact' which forms the gravamen of the libel." In *Foy v. Foy*, 13 Id. 90, 96, the wife asked a divorce for abandonment and adultery by her husband. He denied the desertion and adultery, and replied that she had left him because he had been accused of forgery. The court say that, if a wife leave her husband and refuse to live with him, "without sufficient cause," and he afterwards lives in adultery, this is no cause of divorce, for the consequence may be ascribed to her prior violation of the duty of wife. What is "sufficient cause," the court do not state; but they hold that the husband being accused of a crime, or his being guilty thereof, is no sufficient cause. Where the cruelty alleged against the defendant was caused by the conduct of the plaintiff, "well calculated to provoke the ill-treatment of which she complains," the divorce was not granted: *Johnson v. Johnson*, 14 Cal. 459. The failure of the husband to provide a home to which his wife could return, his boarding in another family, and the disposition of his property, which "seemed to have been made with a view to affect the very object he has attained, and of which he now complains," were regarded as warranting the court in denying the divorce for

desertion by the wife in *Gilliwaters v. Gilliwaters*, 23 Mo. 60. This case cannot be said to be decided on the ground of connivance, notwithstanding the language in quotations. The husband's intent is not wholly relied upon, the court in a subsequent portion of the opinion, saying: "The conduct of a husband toward his wife may be such as would warrant her in leaving him, although it would not entitle her to a divorce."

It is asserted in *Skinner v. Skinner*, 5 Wis. 449, 451, to be "well settled," that the cruelty which lays a just and legal foundation for a divorce must be unmerited and unprovoked; and that when the wife is ill-treated on account of her own misconduct her remedy is a reform of her manners, unless the return from her husband is wholly unjustified by the provocation, and quite out of proportion to the offense. To support this statement the court cite *Poor v. Poor*, 8 N. H. 307; *Best v. Best*, 1 Adams, 410; *Holden v. Holden*, 1 Hag. Ec. 453; *Wood v. Wood*, 2 Paige, 108; *Bedell v. Bedell*, 1 J. C. R. 604; *Watkins v. Watkins*, 2 Atk. 96. The cruelty complained of in *Skinner v. Skinner*, was the beating, abuse, and the calling of vile names, to which she was subjected by her drunken husband; the misconduct of the wife, considered to have brought about and justified this treatment, was her visiting houses of ill-fame, associating with prostitutes, and riding with them through the public streets in the day-time, and absenting herself from her home for weeks, without her husband's consent. Where the plaintiff "willfully provoked" the cruelty of which she complained, the divorce was denied: *Reed v. Reed*, 4 Nev. 395; and the same principle was applied in *Van Glahn v. Van Glahn*, 46 Ill. 136, a petition for divorce on the ground of cruelty. The court therein say, that the question whether the defendant's violence had been inflicted under wanton provocation from the plaintiff, and was only the working of ordinary human passion, brought into exercise by her misconduct, "is the very marrow of the case;" and they affirm that "the law upon this point is not a subject of dispute," and that "no court has dissolved the marriage tie at the prayer of the wife, because of violence provoked by her own misconduct, even though such violence should proceed to blows." Although it is regarded as "settled" in all of these cases, where cruelty was the gravamen, that the misconduct of the complainant might excuse the violence of the defendant, yet in each it is admitted to be necessary to consider whether the amount of violence was out of proportion to the provocation. And it seems that conduct on the part of the defendant which would otherwise justify a divorce, is out of proportion to a provocation, itself not sufficient to form a ground for divorce.

A case representing the limit to which this doctrine of palliation or excuse has been carried is that of *Knight v. Knight*, 31 Iowa, 451. The wife instituted proceedings for a divorce on the ground of the cruelty of the husband. The petition was denied for two reasons: insufficiency of the evidence to prove the requisite degree of cruelty, and the plaintiff's own misconduct. The misconduct consisted in her being very self-willed, of her not controlling her temper, and in her continued disregard of her husband's injunctions not to associate with a certain man. On one occasion the wife, with her sister, was found by the defendant in the parlor with the person he disliked. And the plaintiff acknowledged that at that time, she was partly undressed, and had her hair down and her shoes off, preparatory to going to bed. It did not appear that the plaintiff's motives were at all impure. Chief Justice Day says: "Another reason why the plaintiff is not entitled to the relief asked, is found in the fact that her own conduct, in our opinion, brought upon her all the ill-treatment of which she complains. We have not a

particle of doubt that if she had justly appreciated the responsibilities and duties of her position, had properly regarded the feelings of her husband, and had restrained her pride and guarded her temper, she might have remained one among the most honored and most cherished of wives. While we do not approve or justify the conduct of the defendant, yet we must allow that we find much to palliate and excuse it in the conduct of the plaintiff." On this latter proposition, Miller, J., dissented, being of opinion that no provocation would justify cruelty to the wife. 1 Bishop on Mar. & Div., sec. 764, says that the defense of justification in divorce causes for cruelty grow out of the "peculiar nature" of these suits, although, as was decided by Judge Field in *Conant v. Conant*, 10 Cal. 249, from a legal point of view, there could be made no distinction between the different grounds of divorce.

The weight of authority, as heretofore shown, is undoubtedly in favor of making the complainant come into court with clean hands. Where desertion has been relied upon, the conduct of the husband towards the wife, which constrained her to remain away, has been successfully interposed as a defense: *Taylor v. Taylor*, 28 N. J. E. (1 Stewart) 207, the vice-chancellor, insisting that to constitute desertion, the separation must have been against the will of the complainant, and that if the husband does not attempt a reconciliation, he can not complain of his wife's staying away from him, though she may have left without cause. That the husband did not seek to effect a reconciliation and induce his wife to return, was pronounced a good bar to the proceedings based upon the wife's alleged desertion, in *Cornish v. Cornish*, 23 N. J. E. (8 C. E. Gr.) 208; *Thorpe v. Thorpe*, 9 R. I. 57.

In divorce suits for adultery, much refinement of distinction has been indulged in by the courts in endeavoring to determine whether the complainant's conduct amounted to connivance, or was nothing other than the behavior of a man testing the faithfulness of his wife, without any ulterior view to a divorce. The decisions, English and American, pertaining to this branch of the subject will be found collected in 2 Bish. M. and Div. sec. 6, *et seq.* The conduct of the complainant, that will excuse the adultery of the defendant and may be successfully relied upon in defense, has not, so far as is known, received an express judicial definition. But it is conceived, that even in the light of those adjudications which receive in justification evidence of the provoking behavior of the plaintiff, the heinous crime of adultery would be out of all proportion to treatment which would not be a good cause for severing the marriage relation.

COMMONWEALTH v. BLANDING.

[3 PICKERING, 304.]

LIBEL, WHERE PUBLISHED.—If the libel be, at the request of the defendant, inserted in a newspaper published in an adjoining state, which usually circulates, and which, in fact, was circulated in this state, he is guilty of a publication in this state.

MALICIOUS INTENT is to be inferred as a conclusion of law from the publication of a libel, where there is no evidence to show the truth of the alleged libel, or its publication from some warrantable purpose.

A LIBEL, THOUGH TRUE, is a public offense, hence the truth of the libel can not ordinarily be shown in defense.

THE LIBERTY OF THE PRESS guaranteed by the constitution, does not secure to libelers immunity from civil or criminal prosecution.

PROCEEDINGS IN LEGISLATIVE ASSEMBLIES, or in courts of justice, whether written or printed, are privileged, and can not be made the basis for actions of libel or slander; but the rule is otherwise if this privilege is abused for malicious purposes.

THE TRUTH OF AN ALLEGED LIBEL may be given in evidence as a defense, when it appears that the matter complained of was communicated from a sincere and honest purpose, free from malice, to some person who had a right to act upon it, and whose duty and interest are concerned in it. A promiscuous promulgation of the same facts, would of itself be the strongest evidence of malice. Whether any particular case is a proper one in which to receive proof of the truth of the libel, is for the court to determine, and if the court receive the proof, the jury must decide whether the publication was made with good motives, and for justifiable purposes.

THE PUBLICATION OF JUDICIAL PROCEEDINGS, if accompanied by comments and insinuations of a defamatory character, make the publisher guilty of libel.

ON AN INDICTMENT FOR PUBLISHING in a newspaper a libel charging an innkeeper with misconduct, for which he is liable to punishment, the truth of the libel is not admissible in evidence.

INDICTMENT charging the defendant with making, framing and causing to be published in a newspaper called The Providence Gazette, at Rehoboth, in the county of Bristol, on the twentieth of February, 1822, a false, scandalous and libelous paragraph, concerning one Enoch Fowler, he then being an innholder in that county, and a good and peaceable citizen. It was proved that the defendant delivered the writing complained of to the printer of the paper, at Providence, Rhode Island; that it was published at the request of the defendant, who was the author of it, and that the paper circulated in Rehoboth, and had so circulated prior to the publication of the article referred to, and that the number containing such article was received and circulated in that town. Evidence of the truth of the charges contained in the article, was rejected.

The jury were instructed, that causing the writing to be published in Rhode Island, knowing that the paper would be circulated in Bristol county, was a sufficient publication in that county, and that the malicious intent charged in the indictment was an inference of law, it not being competent for the defendant to prove the truth of the facts alleged, and that, although the jury were, with the advice of the court, the judges of the law and the fact, they should decide according to the law as actually established, whatever might be their opinion of its policy,

and they should receive the law from the judge, unless they knew it to be otherwise. Verdict for the commonwealth.

W. Baylies, for the defendant, moved to set aside the verdict and for a new trial.

Morton, attorney-general, *contra*.

By Court, PARKER, C. J. As to the first question, which relates to the publication of the supposed libel, we think the admitted facts, that it was at the request of the defendant inserted in a public newspaper printed in Providence, which, though in another state, borders on the county of Bristol, and that that paper usually circulates in the town of Rehoboth, in that county, and that the number containing the libel was actually received and did circulate in that town, were competent and conclusive evidence of a publication in the county of Bristol. In this respect the case is like that of *Rex v. Burdett*, 4 Barn. & Ald. 95.

As to that part of the instructions of the judge, which states that the malicious intent charged in the indictment (there being no evidence admitted to prove the truth of the facts alleged) was an inference of law; this is certainly the common law doctrine, and it never has been repealed by any statute of this commonwealth, nor overruled by any decision of this court; and if the doctrine be true, that the gist or essence of the offense of libel is, that it tends to provoke a breach of the peace, and this certainly is maintained in all the books, then it must follow that when the publication complained of is of a libelous nature, it must be taken to be of a malicious character, unless the defendant shall, within some of the known provisions of law, be admitted to prove, and shall in fact prove, that the allegations made are true, and that he had some warrantable purpose, inconsistent with a malicious intent, in causing the publication.

There are certain cases in which the defendant in a prosecution for libel may acquit himself by showing an honest purpose and proving the truth of his allegations. The general principles upon which such a right depends, are stated in the case of *Commonwealth v. Clap*, 4 Mass. 168 [3 Am. Dec. 212]; though, without doubt, there are cases, other than those mentioned in the opinion of the court in that case, as illustrations of the general doctrine, in which the same principles will apply. The law, as laid down in the case before cited, has stood before the public nearly twenty years, and successive legislatures

must be presumed to have acquiesced in its wisdom and policy, or it would have been altered by the statute.

The general principle decided is, that it is immaterial to the character of a libel as a public offense, whether the matter of it be true or false; not, as some have affirmed, because the law makes no distinction between truth and falsehood, but because the interest of the public requires that men not invested with authority by the laws shall not usurp the power of public accusation, and arraign before the public, with malicious motives, their neighbors and fellow citizens, exposing them to partial trials in forms not warranted by the constitution or laws, and condemning them to a species of ignominy which is often a heavier punishment than the law would inflict for the offenses or misconduct of which they are thus officiously accused. And surely, so long as preventive justice shall be deemed more salutary than vindictive, all wise governments will hold it necessary to curb the disposition, always too prevalent, to excite ill-temper and ill-blood by exposing the offenses, faults or foibles of men, who, if guilty of any violation of law, are amenable to punishment in the ordinary way, and if liable to censure for private vices, irregularities of temper or unaccommodating manners, should be left, as the law leaves them, to the correction of conscience, and those silent but powerful punishments which their misconduct itself will supply.

No state of society would be more deplorable than that which would admit an indiscriminate right in every citizen to arraign the conduct of every other, before the public, in newspapers, handbills, or other modes of publication, not only for crimes, but for faults, foibles, deformities of mind or person, even admitting all such allegations to be true. When the accusation is made by public bodies or officers, whose duty it is by law to detect and prosecute offenses, the charge and the investigation are submitted to, and no spirit of revenge is produced; but if private intermeddlers, assuming the character of reformers, should have the right to become public accusers, and when called to account, to defend themselves by breaking into the circle of friends, families, children and domestics, to prove the existence of errors or faults which may have been overlooked or forgiven where they were most injurious, the man who is thus accused, without lawful process, might be expected to avenge himself by unlawful means, and duels or assassinations would be the common occurrences of the times. Instances are recollected where violence, and even death, has ensued from such proceedings. It was with a wise

regard to these evils, that the common law has put a check upon the licentiousness of the press, and the expression of opinion by writing, painting, etc., when the effect and object is to blacken the character of any one, or to disturb his comfort, the public good not being the end and purpose of such publication, or if that is professed, the public peace requiring a different mode of accusation.

Nor does our constitution or declaration of rights abrogate the common law in this respect, as some have insisted. The sixteenth article declares that, "The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth." The liberty of the press, not its licentiousness; this is the construction which a just regard to the other parts of that instrument, and to the wisdom of those who formed it, requires. In the eleventh article it is declared, that every "subject of the commonwealth ought to find a certain remedy by having recourse to the laws for all injuries or wrongs which he may receive in his person, property or character." And thus the general declaration in the sixteenth article is qualified. Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction.

The common law, therefore, is left unimpaired by the constitution, except as will hereafter be stated, and by that law, unquestionably, the propagator of written or printed tales to the essential prejudice of any one in his estate or reputation, is a public offender, and is not allowed to excuse himself by the additional wrong of proving in a court of justice, in a collateral way, the facts which he has unwarrantably promulgated.

And yet there are some exceptions to this general rule, recognized by the common law, and others which are rendered necessary by the principles of our government. These exceptions are all founded in regard to certain public interests, which are of more importance than the character or tranquillity of any individual. All proceedings in legislative assemblies, whether by speech, written documents, or otherwise, are protected from

scrutiny elsewhere than in those bodies themselves, because it is essential to the maintenance of public liberty, that in such assemblies the tongue and the press should be wholly unshackled. So proceedings in courts of justice, in which the reputation of individuals may be involved, are to be free from future animadversions, because the investigation of right demands the utmost latitude of inquiry, and men ought not to be deterred from prosecuting or defending these by fear of punishment or damages. Yet, in these instances, if this necessary indulgence is abused for malicious purposes, a pretense only being made of the form of legislative or judicial process, the party so conducting himself is amenable to the law. The right also of complaining to any public constituted body, of the malversation or oppressive conduct of any of its officers or agents, with a view to redress for actual wrong, or the removal of an unfaithful officer, may be justified, because the case will show that the proceeding does not arise from malicious motives, or if it does, because the common interest requires that such representations should be free. And there are cases of mere private import, such as an honest, though mistaken, character of a servant, which, when requested by any one having an interest, the law considers innocent. These cases are all provided for by the common law, and they go far to render harmless that most decried rule, that the truth is no defense in a prosecution for libel: *Rex v. Wright*, 8 T. R. 293; *Rex v. Creevey*, 1 Mau. & Sel. 273; *Lake v. King*, 1 Saund. 131; *Asley v. Younge*, 2 Burr. 807; *Rogers v. Clifton*, 3 Bos. & P. 507; *Esp. Dig.* (third ed.) 505; *Thorn v. Blanchard*, 5 Johns. 508; *Rex v. Fisher*, 2 Campb. 563; Starkie on Slander, c. 11.

That by the common law always, so far as it can be traced back, the doctrine as now mentioned in regard to excluding the truth of the matters alleged, as a defense in a public prosecution for libel, with the exceptions stated, has been recognized and enforced, will be denied by no lawyer who has thoroughly examined the subject: *De Libellis Famosis*, 5 Co. 125; 4 Bl. Com. 150. Indeed, it has always been objected as one of the imperfections of that system, by those who have chosen to question its title to veneration; but, like most other principles of the common law, it is founded in common sense and common justice, and is not peculiar to that system, for it prevails in the civil law, and, indeed, the code of no civilized country would repudiate it. It may be altered, or, as may be thought, mitigated by legislative enactments in some states; but this very

legislative interference is grounded upon the existence of the principle at common law. If any reformation, therefore, is wanted, which, under the judicial expositions in this commonwealth may well be doubted, none but the legislature is competent to make it.

For a very sensible, learned and manly discussion of this subject, I refer to the opinion of the court of appeals in South Carolina, delivered by Waties, J., in the case of *The State v. Lehre*, published in 4 Hall's Law Journ. 48. The doctrine so laid down had the sanction of the intelligent bar of the state. The truth is, that the rule, with the exceptions stated, has never been complained of, except when applied to prosecutions for libel of political bearing and character. In such prosecutions the passions of men are always much inflamed, and there is a desire, on one side or the other, to break through those wholesome restraints which the law has devised for the protection of private character and the preservation of the public peace. An attack upon public men, even in regard to their private characters, has been viewed as a right growing out of our free institutions, and essential to the support of them. And so far forth as this notion is correct and salutary, it has been incorporated into our law, and serves to form an exception to the general rule, not distinctly admitted by the common law, though not at all inconsistent with its general character. The case of *Commonwealth v. Clap* was the first, since the adoption of the constitution, which called for a discussion of these principles, and in that case it is very clearly and distinctly settled, that if the truth only is told of public elective officers, or of acknowledged candidates for offices, in a decent manner and with a view properly to influence an election, it is justifiable. For the reasons upon which that doctrine is founded, we refer to the case above cited. The force of them will not be disputed.

But there are certain other cases, not yet distinctly adjudicated upon, where the truth of charges is a legitimate ground of defense, by clear inference from principles recognized by the common law and our own tribunals. In *Commonwealth v. Clap*, it is stated, "that a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel." This is put for illustration of the principle, not to exhibit the only instance in which it is to

be applied. A complaint to the executive against an officer holding his place at its pleasure; to a court against an officer whom they have the power to dismiss; to any body of men having power over its officers; the subject of the complaint being of a public nature, or the person complaining having a particular interest in it, falls within the same principle.

Thus, if a minister of the gospel should be guilty of gross immoralities, and one of his parish should complain to the church in order that an inquiry might be instituted, or if a candidate for the ministry should, from vicious habits, be unfit for the station he seeks, since all are interested in the purity of ministerial character, information to those whose duty it is to determine his qualifications, would not be libelous if communicated in a spirit of truth and candor. Various other cases might be put, in which, if it appeared that the purpose was sincere and upright, and wholly free from malice, the truth of the facts stated would be a good defense. But in all such cases, the information is to be given to those who have a right to act upon it, and whose interest and duty are concerned in it; for a promiscuous promulgation of the same facts would of itself be the strongest evidence of malice, and in such cases the court must judge whether the occasion is a fit and proper one for the admission of such defense, and the jury must determine the motives and the end.

With this exposition of the law of libel in this commonwealth, in which we are warranted by the common law, by the constitution, and by judicial decisions, there seems to be no reason for complaint against the general rule, which is so often the theme of popular declamation. A further relaxation can scarcely take place without involving the community, families and individuals, in those contentions and acrimonious conflicts which will render the social state little, if at all, better than the savage.

The principal difference between the common law as admitted here, and the statute provisions of the state of New York, is, that there the jury are to judge of the occasion, as well as the motives and ends of the publication, whereas, with us, it must appear first to the court that the case is a proper one for the admission of the truth in evidence. The difficulty with the New York system is, that in every prosecution for a libel, whether of a public or a private nature, the whole matter must be made the subject of open investigation, so that a man's whole domestic relations may be brought before the public in order to ascertain whether the motives of the alleged libeler were good and his end justifiable; whereas, our system proceeds on the ground that

private individuals have nothing to do with the conduct of their neighbors as it may affect the public, unless they proceed in due course of legal process against them in some tribunal, where, instead of being crushed by public opinion factitiously made up on newspaper paragraphs, they will have full opportunity to indicate their innocence, or if guilty, meet only the punishment which the law has awarded for their offense. If the public sentiment in this commonwealth is in favor of a more relaxed system, the power is in the hands of the legislature, which can mold the law at its pleasure.

Having thus attempted to vindicate the law of libel, as established in this commonwealth, from the aspersions which are frequently cast upon it, we will consider its application to the case before us, in order to determine whether, upon either of the grounds assumed, a new trial ought to be granted. The first ground, to wit, the want of legal proof that the libel was published, as alleged, within the county of Bristol, has been considered and overruled; as has also the objection to the charge to the jury.

The other objection, which opens the general question, is that the judge refused to admit in evidence the inquisition which is alluded to in the publication, and with a view to prove the truth of the facts therein stated. Had the inquisition been published without any defamatory comment, it certainly would not have furnished ground for this prosecution; for it does not of itself contain any libelous matter, and it is in the nature of a judicial inquiry, the publication of which would not be criminal, unaccompanied by direct proof of malice. The inquisition merely states that a deceased stranger, who was found dead in a tavern kept by Fowler, came to his death by intoxication. Now, this may be true, without any implication against Fowler; for every innholder is liable to have drunken people come to his house, and if they die there, he may be entirely innocent of the cause of their death. But the remarks made by the defendant charge Fowler with having administered the liquid poison, and thus being the cause of the death of the stranger; and the public are warned against resorting to the house where such practice is allowed; and the municipal authorities are invoked to exert their power by taking away or withholding the license of Fowler to keep a public house. The matter of this publication is certainly libelous, as it insinuates gross misconduct against Fowler, and directly charges him with a violation of his duty, and exposes him to the loss of his liveli-

hood, so far as that depends upon the reputation of his inn for regularity and order. Admitting the account of the inquisition to be correct as published, yet the addition of comments and insinuations, tending to asperse Fowler's character, renders it libelous: *Thomas v. Crowell*, 7 Johns. 264 [5 Am. Dec. 269].

But it is said that this is a matter of public concern, and that the defendant was impelled by a sense of public duty to warn travelers and others from a house which was thus deservedly stigmatized. The answer is, that the defendant did not select a proper vehicle for the communication. The natural effect of a publication of this sort, in a newspaper, is to procure a condemnation in the public mind of the party accused, and his punishment, by bringing his house into disrepute, without any opportunity of defense on his part, so that the accuser becomes judge and executioner at one stroke, and his purpose, if a malicious one, is answered, without any means of relief; for the mischief to the person libeled would be quite as great if he were innocent as if he were guilty. If it should be said in answer, that all this is right if the allegation be true, and if not true, he may recover his damages in an action of slander, it may justly be replied, that this remedy is uncertain and incomplete; for in many cases the slanderer will be unable to respond in damages, and the suffering party will be subjected to the additional injury of a troublesome and expensive lawsuit, with little or no hope of recompense.

There may be cases where (there being no other mode by which great mischief can be warded off from the public) a newspaper communication, made with the sole view of preserving the citizens from injury to their life or health, would be justifiable. Such might be the case of an apothecary selling and distributing poison in the form of medicine, stated by a distinguished member of the late convention for revising the constitution. This is an extreme case, where to delay information until the forms of law should be pursued might endanger the lives of hundreds, and such a case would be a law to itself, the public safety being the supreme law, and it being every citizens' duty to give warning in such cases. There may be cases of gross swindling, where nothing but immediate notice would secure the public against depredation, which would be governed by the same principle.

But in the case before us there was no such urgent necessity. The statute regulating licensed houses provides the restrictions and the punishment which the legislature has thought adequate to the offenses of the nature contained in this libel. For suffer-

ing excessive drinking in his house, the innkeeper is subject to a penalty. For a second offense, he is to be put under bond for good behavior, in addition to a pecuniary mulct. For a third, he is to forfeit his license, and shall be disqualified to keep a public house for two years; and besides all this, if his misconduct is continued, so as to constitute his house disorderly, or so that he violates the law for regulating it, he forfeits the penalty of his recognizance. Other guards and securities are provided in the statute, to prevent the abuse of the license, and a complaint may be made to the selectmen, to a justice of the peace, or to a grand jury, by any person who has knowledge of such offenses, without incurring the risk of a prosecution for libel. There was then no necessity for this newspaper publication, and the defendant, by resorting to it, has taken the law into his own hands unwarrantably, instead of resorting to those tribunals which the laws have constituted for the correction of these offenses. This, then, is a case in which the defendant can not be allowed to excuse himself by showing the truth of the accusation, which he has unjustifiably made. He had no right to arraign the prosecutor before the public in the form which he adopted, and thus destroy the reputation of his house, without leaving him any means of showing his innocence of the charges made against him. The occasion was not a proper one for a newspaper denunciation.

Motion for a new trial overruled.

VENUE IN LIBEL.—The action of libel is transitory. The venue should be laid in the county in which the parties, or some of them, reside, or if none of them reside within the state, then, in such county as the plaintiff may designate, subject in every case to the power of the court to change the place of trial: *Townshend on Slander and Libel*, sec. 268. With respect to newspaper libel, the cases are not numerous but are explicit to the point that, the circulation of a newspaper in the place where the plaintiff resides, is a sufficient publication in that place, notwithstanding the paper was printed and published in another county or state: *Clinton v. Crosswell*, 2 Am. Dec. 235; *Root v. King*, 4 Cow. 403; *Lucan v. Cavendish*, 10 Irish Law Times, 537; *Pinckney v. Collins*, 1 T. R. 571; *Clissold v. Clissold*, Id. 647. And the doctrine of the principal case, relative to the commission of the offense in the place where the libelous article was circulated, is approved in *Commonwealth v. Macloon*, 101 Mass. 6; *Commonwealth v. Pettes*, 114 Id. 311. The question of place of publication is important only in criminal prosecutions for libel, as the injury which may be redressed by a civil action follows the persons, and the fact of publication without the state is in this regard immaterial. In 1 Arch. Pr. 369, it is laid down that in an indictment for publishing a libel, the venue must be in the county where it was published; and the note to this section states: In an indictment for a libel, if the defendant has once authorized the publication, he is guilty of a publication, in whatever county the libel is after-

wards in consequence published: Bull. N. P. 6; 6 East, 56. And if a party writes and composes a libel in one county with an intent to publish, and afterwards publishes it in another, he may be indicted in either: 4 B. and A. 95; and see 3 Id. 717. A mere acknowledgment by the defendant in the county in which the venue is laid of the fact of publication, which, in truth, was in another county, is not sufficient to warrant the trial in the first county: 7 East, 68. Nor is the post-mark on a libelous letter, of a particular place within the county where the venue is laid, sufficient evidence of the publication there by the defendant; but if it be sent to the prosecutor at a place without the county, and yet actually received by him within it, that will be sufficient to support the indictment: 1 Campb. 215, 216.

In criminal prosecutions for libel, a change of venue, as in other criminal cases, rests largely upon statute. With respect to the right to have the venue changed on the ground of disqualification of the presiding judge, or of the probability of not obtaining a fair and impartial trial, see Pomeroy's notes to 1 Arch. Pr. 231. That the convenience of witnesses is not a good ground for changing the place of trial in an indictment for libel, is determined in *Lucan v. Cavendish*, 10 Irish Law Times, 537. And in *People v. Harris*, 5 Denio, 150, 153, the court affirm generally that: "The convenience of the prosecutor, the accused, or the witnesses, has never been allowed either here or in England as a ground for changing the place of trial in a criminal case; and we do not feel at liberty to make such a precedent. The statute has introduced no new rule. The practice has been the same since 1830 that it was before that time."

In civil suits for libelous publications, the convenience of the suitors and the saving of expense are to be considered in changing the place of trial. Thus, where the plaintiff did not reside nor have any witnesses in the county where the venue was laid, he was put to his election to select either the place of the residence of himself and his witnesses, or that of the defendant and his witnesses: *Nicholson v. Lathrop*, 3 Johns. 139. In *Duryee v. Orcutt*, 9 Johns. 248, the general rules regarding venue in transitory actions were stated, and in speaking of these actions in which the court included, "libels dispersed in several counties," they recognize this principle: "In these cases the venue will not be changed but upon special grounds, as where the witnesses of both parties reside in the county to which the defendant wishes to bring the venue. If the plaintiff's witnesses reside in the county in which he has laid the venue, unless there is a great and striking preponderance against him, the venue will not be changed." This decision is quoted and followed in *Root v. King*, 4 Cow. 403, where the motion to change the place of trial was denied, the balance of number or convenience of witnesses or parties not being sufficiently marked to require the change.

In *Percy v. Seward*, 6 Abb. Pr. 326, actions of libel were brought at the same time in each county of the state against the same defendants for the publication of the same libel, and on defendant's motion the actions were consolidated and tried in the county in which all the parties resided.

Section 9 of article I of the recently-adopted constitution of California declares that "Indictments found, or information laid, for publication in newspapers, shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause."

POTTER v. HALL.

[3 PICKERING, 368.]

A STAGE COACH IS LIABLE TO ATTACHMENT, although part of the horses are hitched on, and the passengers engaged, but not seated; also if it has reached its destined place, though two passengers yet remain seated in the expectation of being taken to their residences.

TRESPASS against the sheriff for attaching two stage coaches under the following circumstances: One of the coaches was attached near the time of starting from Boston to Salem, when some of the horses were fastened to it and eight or nine passengers were ready to go in the coach. The other had arrived from Salem, and was attached while in the yard into which it was ordinarily driven after the passengers had been distributed; but at the time of the attachment, two ladies were in the coach waiting to be carried to their residences, and the horses were still hitched to it. The defendant submitted to a default, subject to the opinion of the court.

Oliver and Cummins, for the plaintiff. Our law of attachment is borrowed from the English law of distress; and according to such law, whatever is in present use or occupation is exempt: *Simpson v. Hartop*, Willes, 513; *Story v. Robinson*, 6 T. R. 139; *Gorton v. Falkner*, 4 Id. 565; *Hutchins v. Chambers*, 1 Burr. 579; Co. Lit. 47, a.

Saltonsall, contra. An attachment under our laws was originally like a distress, but afterwards the property attached was made security for the judgment, and very little analogy remained. Our statute of exemption being in derogation of the rights of creditors is to be strictly construed: Com. Dig. Distress, C.; 2 Inst. 132; *Buckingham v. Billings*, 13 Mass. 85; 5 Dane's Ab. 36; *Badlam v. Tucker*, 1 Pick. 389 [11 Am. Dec. 202]; *Daily v. May*, 5 Mass. 313; *Penhallow v. Dwight*, 7 Id. 34 [5 Am. Dec. 21]; *Campbell v. Johnson*, 11 Id. 184.

By Court, PARKER, C. J. If the coaches were not liable to attachment, it must be because they were chattels actually in use, not because they could not be returned in the same plight, which was the ground on which *Bond v. Ward*, 7 Mass. 28 [5 Am. Dec. 28], was settled. If anything is capable of being returned in the same plight, it is such a vehicle, for being kept under cover, it will be more valuable than if in the use of the owner. As to their being actually in use, we should not be willing to decide that on that account alone they were not attachable, for the same

reason will apply with equal force to ships, steamboats and other marine vehicles employed in the transportation of goods or passengers, and I believe it has never yet been doubted that under our laws such property is attachable. We think, however, that it is not necessary to decide the question thus broadly, viz., that a ship or vessel actually underway with freight or passengers, or a stage-coach actually on the road traveling, is attachable. There is a difficulty in that question on both sides, but we feel clear that neither of the coaches was so in use when attached as to be exempted. One was preparing to go out with two of the horses hitched on, and the passengers engaged, but not seated. We see not why, if the horses were in the barn, harnessed and ready to be put to the coach, or the passengers had entered their names on the stage-book the day before, the same reason for exemption would not exist. With respect to the other coach, it had arrived at its destined place, and although two female passengers were remaining in it expecting to be carried to their places of residence, yet this was not necessary, for they might have walked home, or the driver might, without much inconvenience, if he was bound to see them at their houses, have provided other means of conveying them and their baggage.

It is said that property thus situated was not subject by the common law to distress for rent, and that the same law is to determine what property is or is not attachable under our statutes. The principles of the common law will undoubtedly apply, because founded on reason, but the application of these principles may be different now from that which was made several hundred years ago, when the rule was laid down. The state of the country then required larger exemptions than at present; everything then was subservient to agriculture. Now commerce and credit assume an equal rank, and things which were necessary for a man's living at a former period, have ceased to be so. And the parliament of Great Britain has regarded the change of circumstances in that kingdom, by providing in St. 2 W. & M., c. 5, that sheaves or shocks of corn, or corn in the straw or loose, or hay upon a hovel, stack or rick, or otherwise, on the land, may be distrained for rent on a demise, lease or contract, and by St. 11, Geo. II, c. 19, landlords are empowered to distrain all sorts of corn, grass or other product growing on the estate demised, and to cut and gather them when ripe. These statutes, it is true, do not operate in this country, but the immemorial usage of the commonwealth under the various attachment laws has a force equally binding, and several judicial decis-

ions have occurred in which it has been considered, that as the reasons of the old common law have ceased, so also has the law ceased. Thus, in the case of *Campbell v. Johnson*, 11 Mass. 184, it was determined that hay in a barn is liable to be attached on mesne process, and Sewall, C. J., expressly states as a ground of decision, that the condition of husbandry with us, and the circumstances of the country, did not require the application of the rule, which the ancient common law was supposed to furnish. And in the case of *Penhallow v. Dwight*, it was decided, that corn standing in the field, if ripe, might be cut down and seized in execution.

The cases put in Com. Dig., to illustrate the general position that chattels in actual use are not to be taken in distress, show that the rule was applied to things comparatively of small value, and such as could not be taken without great inconvenience, and in some of the cases they were other person's property accidentally upon the land; a horse actually in riding, or going to mill, or standing at the miller's door, etc. To apply a rule which had protected such kind of property to articles of luxury, or of great value, would be contrary to the reason of the common law. Stage-coaches are often of great value, and many of them owned by the same person. Ships, steamboats, etc., come within the same reason; creditors, and credit itself, would be exceedingly injured if they were held free from attachment.

Our legislature seems to have considered the common law in this respect as obsolete, or repealed by usage, in the several statutes they have enacted, exempting articles of small value, but of great necessity, from attachment.

Plaintiff nonsuit.

BODWELL v. OSGOOD.

[3 PICKERING, 379.]

LIBEL.—A false complaint made with express malice, or without probable cause, to a body having power to redress the wrong complained of, may be the subject of an action of libel.

THE QUESTION OF MALICE, in publishing a libel, is to be decided by the jury. The deliberate publication of a calumny, knowing it to be false, or without having reason to believe it true, is conclusive evidence of malice.

MALICE, EVIDENCE OF.—Taking depositions with the view to prove the

truth of a libel, and then abandoning this defense at the trial, may properly be referred to the jury on the question of malice, but not on that of damages.

NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES, awarded by a jury to plaintiff for a libel, will not be granted, unless a strong case is made out.

CASE for a libel; plea, the general issue. The plaintiff was a schoolmistress in Methuen, and a young lady of good education and respectable connections. She had been employed as teacher in Methuen and other towns for nine or ten years. The defendant had been for many years a representative from his town in the general court, was a magistrate of very respectable character, and the most wealthy inhabitant of Methuen. The supposed libel was a written communication addressed to the committee of a school district in Methuen, wherein the defendant, after stating that he had learned that the committee had employed the plaintiff to teach in that district, remonstrates against the appointment, accuses the plaintiff of want of chastity in several instances, and pledges himself to prove the charges.

The defendant did not endeavor to prove the truth of the charges, but rested his defense on the entire absence of malice. Evidence was introduced on both sides concerning the plaintiff's general character for chastity, and as to malice on the defendant's part. It appeared that after the commencement of this action, defendant caused a number of witnesses to be examined in a public manner before a magistrate in Methuen, in order to prove the truth of the charges and the plaintiff's bad character, when no legal cause existed for taking such depositions; the defendant merely suggesting that he was apprehensive that the witnesses might leave the commonwealth, although there was no foundation for such apprehension. Defendant's counsel urged that even if he knew, at the time of making the charges, that they were false, no action would lie, because the complaint was made to persons having competent authority to redress the grievance complained of.

PUTMAN, J., before whom the cause was tried, charged the jury, that as the defendant did not contend that the charges were true, the verdict should be for the plaintiff, if she had proved that they were made and published maliciously; but that if the jury believed the defendant wrote and published the supposed libel, under a belief that the charges were true, and with an honest intent to cause the plaintiff to be removed from the

school for want of chastity, the verdict should be for the defendant; that if it was necessary to prove that the libel was malicious as well as false, and that if the plaintiff did not prove the malice beyond a reasonable doubt, such doubt should operate in favor of the defendant, adopting the principle that it was of the utmost importance that instructors of youth should be of pure morals. The judge also stated, that malice might be implied or expressed, and upon the subject of implied malice, he referred the jury to the evidence, that defendant had caused his son to make inquiries before the charges were preferred, and that defendant had formerly undertaken to prove the charges, but did not put their truth in issue. Verdict for the plaintiff for one thousand four hundred dollars.

Webster and Saltonstall, for the defendant, moved for a new trial, contending that the damages were excessive: *Duberly v. Gunning*, 4 T. R. 657; *Hewlett v. Cruchley*, 5 Taun. 277; *Coffin v. Coffin*, 4 Mass. 1 [3 Am. Dec. 189]. That the school committee had authority to investigate the character of the plaintiff, and, therefore, this action could not be maintained: *Culler v. Dixon*, 4 Co. 14; *Lake v. King*, 1 Saund. 131; *Asley v. Younge*, 2 Burr. 807; *Rex v. Baillie*, 2 Esp. Dig. 506; *Thorn v. Blanchard*, 5 Johns. 508. That the facts proved did not warrant the inference of a malicious intent: *Jarvis v. Hatheway*, 3 Johns. 180 [3 Am. Dec. 473]; *McMillan v. Birch*, 1 Binn. 178 [2 Am. Dec. 426]; *Weatherston v. Hawkins*, 1 T. R. 110; *Edmonson v. Stevenson*, Bull. N. P. 8; *Rogers v. Clifton*, 3 Bos. & Pul. 287.

Cummins and Spaulding, contra.

By Court, WILDE, J. It cannot be doubted that an action for a malicious prosecution might have been maintained upon the facts reported, if the accusation complained of had been made in the regular and ordinary course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge, and to punish the supposed offender. But the school committee to whom complaint was made had no such power, and an action for a malicious prosecution would not lie. If, therefore, this action cannot be maintained, the plaintiff is remediless.

We do not, however, apprehend that the law is so defective as to afford no remedy in a case like this; nor, in our opinion, has any good reason been assigned why the present action should not be sustained. As the case was left to the jury, we consider the fact established by the verdict that the accusation

was false and utterly groundless, and that the defendant knew it to be false at the time of publication. It may, therefore, be admitted that if the defendant had proceeded with honest intentions, believing the accusation to be true, although in fact it was not, he would be entitled to protection; and that the occasion of the publication would prevent the legal inference of malice. Indeed, the doctrine contended for by Emmet, in the case of *Thorn v. Blanchard*, 5 Johns. 508, and sanctioned by a majority of the court of errors, may be admitted in its fullest extent, without impeaching the grounds of the present action. It was admitted in that case that the action might have been sustained if there had been proof of express malice, or want of probable cause. In this case there was such proof, and it was put to the jury to decide whether the publication was malicious or not. And they were instructed to find for the defendant, if they should be of opinion from the evidence that he acted with honest intentions, and believed that the charges made in the supposed libel were true. The jury, therefore, must have been brought to the conclusion that he did not act with such intentions, and that he did not believe the charges to be true; that he acted maliciously, and not with a view to correct a public grievance, for that he knew no such grievance as the one alleged in the libel existed. We think the evidence sufficient to warrant these conclusions; and if so, then most certainly there was sufficient evidence of malice, and the defendant's principal ground of defense utterly fails.

The deliberate publication of a calumny, when the publisher knows it to be false, or has reason to believe it to be true, is conclusive evidence of malice. It is, however, unnecessary to weigh the evidence; it is sufficient that it was satisfactory to the jury, and proper for their consideration. And it is clear that in the class of cases in which this ranges itself, the question of malice is exclusively for the jury. It was, therefore, properly left to the jury to say whether, considering all the circumstances of the case, the conduct of the defendant was not malicious.

So also the instructions to the jury seem to us perfectly correct. It would have been wrong, no doubt, as has been urged by the counsel for the defendant, to consider the not pleading in justification as a cause for enhancing damages. But the direction is not to be so understood. The jury were to decide whether the publication was malicious or not, and the evidence of the defendant's procuring depositions, etc., before trial, and

after all declining any attempt to prove the truth of the charges, was referred to the jury on the question of malice; and this was clearly correct.

It has been argued that the jury should have been instructed that the application to a tribunal competent to redress the supposed grievance, was *prima facie* evidence that the defendant acted fairly, and that the burden of proof was on the plaintiff to remove this presumption. The judge was not requested thus to instruct the jury. He did, however, instruct them that the burden of proof was on the plaintiff to satisfy them that the libel was malicious, and that if the plaintiff did not prove the malice beyond any reasonable doubt, that doubt should be in favor of the defendant. It was unnecessary to be more particular, and it seems impossible that on this point the jury could have been misled.

As to the damages, they are certainly large, perhaps too large, but not so extravagant as to justify the interference of the court. We do not doubt our power to grant new trials on the ground of excessive damages, in cases of personal torts; and when they are clearly excessive, and greatly disproportionate to the injury proved, we are bound to interpose. But a strong case must be made out; and this does not appear to us to be such a case, considering the aggravated nature of the charge and the situation of the parties. The plaintiff being an unprotected female, having nothing whereon to depend but an unblemished reputation, and the defendant being a man of wealth and influence, we cannot say that the damages are clearly exorbitant.

Motion for new trial overruled.

A COMMUNICATION ADDRESSED TO A BODY, or to an individual, for the purpose of procuring some redress which that body or individual is empowered to grant, is in its nature privileged, being made under circumstances that rebut the presumption of malice. But to entitle one to immunity for charges made to such board or officer, it is necessary that they should have been preferred with good motives and with probable cause. It is, moreover, essential "that the tribunal, individual or body, must be vested with authority to render judgment, or make a decision in the case, or to entertain the proceeding in order to give them the protection of privileged communication:" *Hosmer v. Loveland*, 19 Barb. 111. Questions bearing upon this often arise in the course of church discipline, and it is generally held that communication of a church member to the governing body, complaining of the conduct of a brother member or of the clergy is privileged: *Remington v. Congdon*, 13 Am. Dec. 431; *Bradley v. Heath*, 12 Pick. 163; *Kleizer v. Symmes*, 40 Ind. 562; *Holt v. Parsons*, 23 Tex. 9; *O'Donoghue v. McGovern*, 23 Wend. 26; *Dial v. Holter*, 6 Ohio St. 243. Petitions to the governor of a state: *Larkin*

v. *Noonan*, 19 Wis. 82; a memorial to the post-office department, charging the plaintiff with fraud: *Cook v. Hill*, 3 Sandf. 341; a letter from the inhabitant of a school district to the school committee complaining of a teacher: *Harwood v. Keech*, 4 Hun. 389, are privileged. But where the defendant, on refusing to serve as one of a church-festival committee assigned as a reason therefor that one of the committee had the venereal disease, and that "he had been with the plaintiff," a woman, the court, in *York v. Johnson*, 116 Mass. 482, pronounced the assertion unprivileged, and referred to *Krebs v. Oliver*, 12 Gray, 239, as decisive. This citation was in principle the same as *York v. Johnson*, and the court there held words slanderous which were not spoken "either for the protection of any interest of his own, or in the discharge of any duty, social, moral or legal;" and stated that the person uttering them, "was strictly a volunteer in making the communication."

In regard to publications of the above nature, where the occasion has been held to rebut the presumption of malice, to sustain an action therefor it is necessary for the plaintiff to prove the malice of the defendant. To this object, the plaintiff may show that the defendant was influenced by some other motives than the mere discharge of duty: *Ormsby v. Douglas*, 37 N. Y. 477, citing *Howard v. Thompson*, 21 Wend. 319, 320; *Somerville v. Hawkins*, 3 Eng. L. and Eq. 506, 507; *Taylor v. Hawkins*, 5 Id. 253, 256, 257; *Harris v. Thompson*, 24 Id. 370, 380, 381. And that the communication was made without probable cause therefor; or in the absence of a belief in the truth of the matters alleged, are circumstances from which the inference of malice may be drawn: *Townshend on Slander and Libel*, sec. 237; *Harwood v. Keech*, 4 Hun. 389.

FANNING v. CHADWICK.

[3 PICKERING, 420.]

ASSUMPT BY ONE PARTNER OR CO-TENANT against another may be sustained when the joint interest has terminated, or the partnership has been dissolved, all accounts being settled and discharged, and a balance remaining due. No express promise to pay such balance is essential. These principles were applied between part owners of a vessel which had been engaged in a whaling voyage.

ASSUMPT on an account annexed and for money had and received. The plaintiff and defendant were part owners in a certain vessel of which the latter was master. While on a whaling voyage, compensation was received by the defendant from a Spanish privateer for landing prisoners on the coast of Africa, and also from a French ship which had been wrecked, for assistance rendered. On defendant's return he accounted with plaintiff according to the usage in cases of whaling voyages. The latter at that time did not know of the two items of compensation mentioned, for which defendant did not account. After the settlement, the plaintiff demanded her proportion of such compensation, but the defendant refused to pay anything,

saying that those items were on his own account. A verdict was taken for the plaintiff subject to the court's opinion, whether in this form the action could be supported.

L. Shaw, W. Phillips, and Sewall, for the defendants, contended that assumpsit would not lie between partners or tenants in common: 1 Chit. Pl. 25; *Smith v. Barrow*, 2 T. R. 476; *Harvey v. Crickett*, 5 Mau. & Sel. 339; *Robson v. Curtis*, 1 Stark. 78; *Murray v. Bogert*, 14 Johns. 322 [7 Am. Dec. 466]; and endeavored to distinguish this case from *Brigham v. Eveleth*, 9 Mass. 538; *Jones v. Harraden*, Id. 540; *Wilby v. Phinney*, 15 Id. 116; and *Bond v. Hays*, 12 Id. 34.

Thatcher and Warner, *contra*, relied upon the cases cited from the reports of this state.

By Court, *WILDE, J.* Without determining whether, upon the facts reported, the parties are to be considered as standing in the relation of copartners or not, we are of opinion that this action may be well maintained. It is true generally that a partner or tenant in common cannot sue his co-tenant or copartner in an action in form *ex contractu*, for a share of the common property, or profits received. But if the joint interest is determined, or the partnership is dissolved, all accounts and liabilities being settled and discharged, and a balance remains due from one co-tenant or copartner to another, it may be recovered in an action of assumpsit. It is said that an express promise is necessary, and such seems to be the English doctrine. But a contrary doctrine has been repeatedly laid down by this court: *Jones v. Harraden*, *Brigham v. Eveleth*, *Bond v. Hays*, and *Wilby v. Phinney*, cited in the argument.

The doctrine laid down in these cases appears to us most reasonable, and we consider it now as well established. It was admitted by the counsel for the defendant in the case of *Wilby v. Phinney*, and was expressly laid down by the court as a settled principle.

It is true that case was decided on its peculiar circumstances, but the principle in question was involved in the decision. *Phinney* was administrator of a deceased partner of *Wilby*, whose estate was insolvent, and the court held that the plaintiff's demand was in nature of a final balance, although the accounts of the partnership were not closed. For it was final as to the plaintiff, he having no further remedy, in any event, against the estate of the deceased partner. On this ground it was held that he was entitled to recover as for a final balance.

This case, therefore, as well as other cases cited, is directly in point, and we see no reason for overruling these decisions, notwithstanding relief may now be had in equity. Besides, this action was commenced before the statute for the purpose was enacted; but had it been otherwise, we should still feel bound to adhere to former decisions. When a plain, convenient and adequate remedy may be had at law, a party ought not to be turned over to a suit in equity. It has been argued that the only remedy at law, if any, is by action of account; but this action is almost obsolete even in England, and there seems to be no necessity for reviving it here. Justice may be administered in a form more simple and less expensive, by an action of assumpsit, especially since the court is authorized to appoint auditors. Assumpsit now has all the advantages, without the disadvantages, peculiar to an action of account.

For these reasons, we are of opinion the plaintiff is entitled to recover, the voyage having been completely settled by the parties, except as to the items sued for in this action.

Judgment according to the verdict.

BABCOCK v. THOMPSON.

[3 PICKERING, 446.]

A BILL OF PARTICULARS should give as much information as a special declaration.

A BILL OF PARTICULARS is amendable, like a declaration.

MONEY LOST AT GAMING, whether by fair play or foul, can not be recovered by the loser, nor by his executor or administrator, unless a remedy is given by statute.

ASSUMPSIT for money had and received. The following bill of particulars was filed:

“The plaintiff, as administrator of Warner Claflen, claims to recover of Thompson the following sums of money and credits received and had of said Warner Claflen, in December, A. D. 1820, to wit:

One \$1000 bank bill not recollected.....	\$1000
Two \$500 bills of Union Bank.....	1000
Two checks upon Boston Banks amounting to.....	250
Bank bills current in the commonwealth amounting to..	500

“The above is all the specification, and as particular as can be given by me.

“A. Moore, attorney for Babcock.”

The plaintiff offered evidence of money fraudulently won at cards, but the evidence was rejected, and a nonsuit entered.

S. D. Parker moved to set the nonsuit aside.

Rand and Fletcher, contra.

By Court, PARKER, C. J. The ground of this action was money lost at gaming, and by foul play. It was objected at the trial, that the plaintiff's particular could not have the defendant to think this to be the ground, and the judge supposed the plaintiff was going to amend. That, however, was not done, and the question now is, whether the particular was sufficient, and whether the nonsuit was rightly ordered.

We consider the objection to be well founded. A particular should give as much information as a special declaration, though without the form. Telling the defendant that the action was for bank bills, gave no information that would aid him in making his defense. This mode of proceeding is of recent origin here, and it seems to be so in England. It was found to be necessary, in consequence of the remedy by action for money had and received being made so common. There is no reason why the same rules should not be applied to it here as in England; and if it is insufficient, it must be attended with the same consequences. Undoubtedly it should be amendable like a declaration.

The question then is, whether the nonsuit was proper. A nonsuit should not be ordered without giving the party an opportunity to rectify a mistake. An insufficient declaration will be a ground for nonsuit, unless the plaintiff moves to amend and obtains leave. So in regard to a bill of particulars. In the present case as there was a mistake, the plaintiff thinking his particular sufficient, we might yet allow him to amend on more strict terms, if it would be of any avail.

But the court are of opinion that the action cannot be maintained. We have no doubt, that according to the general policy and laws of this commonwealth, all gaming is unlawful; and the plaintiff cannot maintain his action, where he is obliged to show his illegal act as the foundation for a recovery. This was pretty fully considered and settled in *Worcester v. Eaton*, and we see no reason now to change the opinion there expressed. Where a party acts illegally, he is to suffer the loss of his money as the consequence, if the money is sought to be recovered, except where he may have a remedy under the particular provisions of some statute. Here is a case of gaming accompanied

with cheating. Clearly if the gaming had been fair, the law would give no remedy. The only question then is, whether the fraud will alter the case. We think it will not. If a man thus voluntarily puts himself in a condition to be cheated, through his illegal act he cheats the government, and the other person cheats him, and they must be left to settle the affair between themselves.

It was intimated that an executor might recover, though the testator himself could not; but we see no authority for the distinction; and it would be an encouragement to gaming, if a man might kill himself, and thereby give his executor a remedy. That the assignees of a bankrupt may recover money lost at play, results from the statutes of bankruptcy; and the case of *Brandon v. Pate*, where that point was decided, it is said that an executor could not bring the action. On general principles, and by the policy of the law, the representative is not to recover back the penalty which the loser may be said to have paid for this transgression.

Motion overruled.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

CHICHESTER v. CANDE.

[3 COWEN, 39.]

AN ORDER OF COURT on a motion or summary application is not technically *res judicata*, but the same matter will not be twice heard without good cause shown.

NUNC PRO TUNC FILING.—Where there were judgment and execution against a party, but by accident the record was not filed, it was, on motion, allowed to be filed *nunc pro tunc*, so that the execution should retain its priority over another writ subsequently issued and levied.

APPLICATION by Russ, assignee of certain judgments, against the defendants, Cande and Lasher, to have the execution of Chichester and Van Wyck, plaintiffs in this action, against said defendants, set aside, and the money paid thereon applied to the payment of the said Russ's judgments, on the ground that no record had been filed of the judgment upon which the plaintiffs' execution was issued. It appeared that a number of executions had been issued against the said defendants, that their property had been sold and the money brought into court, and that on an application to this court at May term, 1822, it was directed that plaintiffs' execution should be first satisfied, then the judgments owned by Russ, and the residue of the money applied to the other executions. Under this order the amount of the plaintiffs' execution was paid over to them, and the remainder was applied on Russ's judgments. At that time Russ sought to obtain a preference over the plaintiffs on account of certain irregularities in their execution, etc., but was unsuccessful, the plaintiffs being allowed to cure the defects by amendment. Subsequently Russ discovered that no record

of the plaintiffs' judgment had ever been filed, when he made the present application. The plaintiffs' attorney swore that he sent the record, duly signed, together with a warrant of attorney to confess judgment, by mail, duly directed to the clerk of this court, before the execution was issued, and supposed they had been filed, until they were returned, from the dead letter office, in January, 1823, which fact was concealed until the present motion. The plaintiffs submitted a counter motion for leave to file the warrant and record *nunc pro tunc*.

S. L. Edwards and H. Bleecker, for the application, contended that the money was paid to the plaintiffs, on the ground that they were judgment-creditors; which ground failed, because no record had ever been filed, and that the court should not go so far as to give them a judgment *nunc pro tunc*, when not a single paper had ever reached the proper office, and that therefore the execution should be set aside and the money paid over to Russ, and they cited *Barrie v. Dana*, 20 Johns. 307; Vin. Abr., Judgment, A. 1, K. a.; 2 Salk. 587, 588.

A. Spencer, contra, contended that although the plaintiffs' judgment was not docketed, yet the record was signed upon a regular bond and warrant of attorney, and that it was the signing and not the filing that gave the record validity. He contended also that although the court had full power to vacate the proceedings, yet it would not be a proper exercise of discretion to do so, and that there was little doubt of the court's power to amend, referring to *Jackson v. Hammond*, 1 Cai. 496; *Seaman v. Drake*, Id. 9; *People v. Burdock*, 3 Id. 104; *White v. Lovejoy*, 3 Johns. 448; *Close v. Gillespy*, Id. 526; and *Hart v. Reynolds*, not reported, where in all the proceedings from the *cognovit* to the docket there was a misnomer of the defendant, and judgment was amended throughout as against a subsequent judgment-creditor with notice, although there was in effect no judgment against the defendant.

By Court, WOODWORTH, J. [after commenting on the facts and deciding some minor questions]: We have considered this case as deliberately and fully as we think its importance and novelty require, and we are satisfied that the respective applications of these parties are addressed to the sound discretion of the court. We do not forget that we are bound by decisions, as far as they can be made to apply to such a case; but we do not find ourselves tied down by these to any particular course of proceeding. The whole tenor and scope of the cases ap-

pear to call for a very extensive exercise of discretion in the amendment of proceedings conducted in good faith, by filling the chasms which may have intervened through accident or mistake, especially in a case where the person whose rights are to be affected has had full information that the proceedings are perfect, and has gone on under the idea that they were so. We feel less delicacy in going for this purpose to the utmost limit of our power, when it is plain that no one can suffer from its exercise. The amendment of proceedings must, in a great measure, rest upon this consideration.

Here is not a struggle in relation to the avails of a freehold estate, the disposition of which might be controlled by the priority of the judgments, which are in themselves liens upon that kind of property; but it relates to the personalty, which is bound by an execution alone. A knowledge that there was or was not a judgment in existence, could in no way be material to Russ, or the creditor who assigned to him, for the reason that a judgment, *per se*, could not affect their rights. The important facts in relation to this case were perfectly understood by all the parties in interest, as early as May term, 1822, when the subject was before this court upon a disclosure of those facts. The money now in question was awarded to Chichester and Van Wyck, and the rights of the parties fully settled. Now, here is nothing *in fieri*. The various executions were levied; a sale made under the direction of the court; the avails paid into court to abide our order, which awarded the money to Chichester and Van Wyck, and that money has been actually paid. The order of the court has been executed. It is, at least, doubtful, on this ground alone, whether we have power to disturb the dispositions which have been made, whether this money has not passed beyond the bounds of our summary jurisdiction. It is true that a matter once passed upon in this way is not deemed technically *res judicata*. It may be opened. We will hear it again, upon good cause being shown; but where the order made has been carried into full execution, and the party has gone off with the avails in his pocket, it is deserving of great consideration, at least, whether we can bring him back into court upon motion, and dictate the course he shall take, whatever additional light may be thrown around the subject; and this, in a special manner, where all has gone forward in good faith. Take the case of a motion to enter satisfaction upon the judgment-roll, on the ground that the money has been paid: the defendant swears to the payment, which the plaintiff

as solemnly denies; the case being balanced, the motion is denied. At another term, the defendant renews his application, upon the ground that he has since discovered a release, or receipt of the plaintiff, acknowledging that he had received the money. We might hear the application, and grant the necessary relief, provided the judgment yet remained *in fieri*; but, suppose, in the meantime, that the money had been paid to, and pocketed by, the plaintiff, I should doubt the power of the court to afford redress in this manner. The suit is at an end, and the whole becomes a matter *in pais*. So of a motion for a new trial, on the ground that undiscovered evidence was behind, which is refused, and the judgment perfected, and execution had; a second application would hardly be received under such circumstances, however strong the appeal. There is a point at which these summary applications should cease, like every other litigation, for the sake of certainty and social quiet.

But there is a precedent which is very direct to bear us out in amending this proceeding on the part of Chichester and Van Wyck, even were the money now in the hands of the clerk. I allude to the case of *Close v. Gillespy*, 3 Johns. 526. A judgment had been signed and docketed upon a warrant of attorney, but through mistake, the name of the defendant's attorney was neither subscribed to the *cognovit* nor inserted in the roll. Mancius, having obtained a subsequent judgment against the defendant, a motion was made by the plaintiff to amend the proceedings *nunc pro tunc*. Now the record was invalid. Both parties considered it so, and the application was opposed because the rights of Mancius were to be affected by the amendment. Executions on both judgments had been delivered to the sheriff, the execution of Close being first delivered, and both he and Mancius claimed a preference; yet Close was allowed to amend though both executions were levied on the same property. The judge who gave the opinion of the court, declares broadly (and in this he is sustained by all the authorities): "I can not perceive that our right to amend, in case of the mistake of one of our officers, is to be controlled by the effect which is to be produced in another case. All amendments affect, more or less, third persons." That case is much in point, and, indeed, appears to me precisely parallel in principle with the one before us, the application for an amendment in which comes strongly commended to us by the principles of justice. Chichester and Van Wyck had a judgment and execution, perfect

in every particular as it respects personal property, except in the mere formality of filing in the clerk's office. Instead of being answered by a constructive docket notice, which was deemed sufficient for the junior creditor in *Close v. Gillespy*, Russ had actual notice in the most explicit manner by an execution and levy. We leave him in possession of all the rights upon which he could ever calculate, in legal propriety, without granting his motion. This must be denied, and Chichester and Van Wyck must take the effect of their motion to amend.

SUTHERLAND, J. It is, perhaps, proper to add, that in forming the opinion which has been delivered we must not be understood as questioning the case of *Barrie v. Dana*, or as doubting that in all cases the roll should be filed before execution can issue. We have been governed much by the peculiar circumstances attending this particular case. The subsequent creditor knew of the judgment, and relied solely on technical ground to defeat it. We hear no complaints from the party defendant.

Rule accordingly.

AMENDMENT OF RECORDS.—The authority of this case has been repeatedly recognized in New York with respect to the power of courts to amend errors and supply omissions in their records, and to order entries and filings to be made *nunc pro tunc*: *Butler v. Lewis*, 10 Wend. 544; *People v. Superior Court*, 18 Id. 677; *Hunt v. Grant*, 19 Id. 92; *Bank of Rochester v. Emerson*, 10 Paige, 361; *Bradford v. Read*, 2 Sandf. Ch. 165; *Roth v. Schloss*, 6 Barb. 313; *Wright v. Alden*, 3 How. Pr. 215; *Neele v. Berryhill*, 4 Id. 18; *Park v. Church*, 5 Id. 383; *Geller v. Hoyt*, 7 Id. 267; *Bowman v. De Peyster*, 2 Daly, 205; *Blossom v. Barry*, 1 Lans. 192; *Burkle v. Luce*, 1 N. Y. 172; *King v. Harris*, 34 Id. 333; *Cook v. Whipple*, 55 Id. 166; *Produce Bank v. Morton*, 67 Id. 202. Concerning judgment entries *nunc pro tunc*, see *Fugua v. Carriell*, 12 Am. Dec. 46. As to amendment of judgments, decrees and verdicts, see *Bramlett v. Pickett*, 12 Am. Dec. 350, and note; and *Rew v. Barker*, 14 Id. 515, and note; and as to amendment of returns, see *Malone v. Samuel*, 13 Id. 172, and note.

JACKSON v. RAMSAY.

[3 COWEN, 75.]

A SHERIFF'S DEED RELATES BACK to the day of the sale, and may therefore be given in evidence, in an action of ejectment, under the general issue, though executed after issue joined.

MATTERS OF DEFENSE, arising after issue joined, must be pleaded *pais darrein continuance*; but a deed which, by relation, takes effect prior to issue joined, need not be so pleaded.

EJECTMENT. Plea, the general issue. The plaintiff claimed under a devise from one McMichael. The defendant claimed

as purchaser of the premises at a sale on two executions against the said McMichael. The sale appeared to have been made October 2, 1818, long prior to the commencement of this action, but the sheriff's deeds bore date August 12, 1823, after the action was commenced and issue joined therein, and the plaintiff objected to the introduction of the said deeds in evidence without a plea of *puis darrein continuance*, etc., and they were accordingly rejected. Motion for a new trial.

E. Fales, for the motion, claimed: 1. That a plea of *puis darrein continuance* was inapplicable to an action of ejectment; 2. That the deeds took effect by relation from the day of sale, though executed afterwards: *Jackson v. Dickenson*, 15 Johns. 309; *Jackson v. Bull*, 1 Johns. Cas. 81; *Jackson v. Raymond*, Id. 85, n. (a); *Johnson v. Stagg*, 2 Johns. 510; 3. That it was not maintenance to perfect title *pendente lite*: *Jackson v. Ketchum*, 8 Johns. 479.

A. C. Paige, contra, contended: 1. That these deeds being matter of defense which arose after issue joined should have been pleaded *puis darrein continuance*: Bull. N. P. 309; 1 Selw. N. P. 147; 1 Chit. Pl. 635, 532; 2 Id. 677, n.; Tidd, 773; 5 Bac. Abr. 477 (6th ed.); 3 Bl. Com. 317; *Jackson v. McConnell*, 11 Johns. 424; 13 Johns. 157; 3 Cai. 173; 2 Dunl. 622; *Jackson v. Rich*, 7 Johns. 194; *Jackson v. Demont*, 9 Id. 55 [6 Am. Dec. 259]; *Jackson v. Bell*, 19 Id. 168; 2. That the defendant's title, if any he had, was acquired by the deeds, and not by the sale: *Jackson v. Catlin*, 2 Johns. 248 [3 Am. Dec. 415]; S. C., 8 Id. 520; *Simonds v. Catlin*, 2 Cai. 61; 3. That the doctrine of relation was applied only under special circumstances and in case of absolute necessity to promote justice, and never to the prejudice of third persons, citing the cases referred to by the defendant's counsel, and also: *Doe v. Telling*, 2 East, 256; 12 Johns. 140; 4 Id. 234; 3 Cai. 263; Jacob's Law Dict., Relation; 4. That the deeds were void within the statute of champerty and maintenance: 1 R. L. 172; 1 Hawk. P. C. c. 84, sec. 9; *Jackson v. Ketchum*, 8 Johns. 479; *Jackson v. Demont*, 9 Id. 55 [6 Am. Dec. 259]; 5. That the deeds were not executed within a reasonable time: *Catlin v. Jackson*, 8 Johns. 552, *per* Lansing, chancellor.

By Court, SUTHERLAND, J. The principal question in the case is, whether a sheriff's deed, executed after issue joined in the cause, the sale having been made before the commencement of the suit, can be given in evidence by the defendant under the

general issue, or should be pleaded *puis darrein continuance*. The declaration was returnable May term, 1823. The consent rule bore date the twenty-eighth of May, and issue was joined the fourth of June, in the same year. The sheriff's sale of the premises in question was made on the second of October, 1818, but the deeds which were offered in evidence, and which were made in pursuance of that sale, were dated the twelfth of August, 1823. That the general rule requiring matter of defense which has arisen after issue joined, to be pleaded *puis darrein continuance*, is applicable to this as well as other actions, is abundantly settled in this court: *Jackson ex dem. Colden v. Rich*, 7 Johns. 194; *Jackson v. Demont*, 9 Id. 60 [6 Am. Dec. 259]; per Kent, C. J.; *Jackson v. McConnell*, 11 Johns. 424; *Jackson v. Bell*, 19 Id. 168.

But it is contended on the part of the defendant that the deeds relate back to the day of sale by the sheriff; and in judgment of law are considered as having been then given. The lessors of the plaintiff derive their title under the will of Alexander McMichael; and the sheriff's sale was under judgments obtained against McMichael in his life-time. When the defendant entered into possession does not appear; but it is to be presumed that he entered under the title acquired by him at the sheriff's sale. The lessors of the plaintiff stand in the same relation to the defendant that Alexander McMichael would, had he been living, and made a lessor. This, therefore, is a case to which the doctrine of relation is peculiarly applicable, there being no strangers or third persons whose interest can be affected by it. That doctrine is this: Where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other act shall have relation: Vin. Ab., tit. Relation, 290; *Harper v. The Bailiffs of Derby*. This principle has been repeatedly recognized. In *Jackson ex dem. Loan Officers of Rensselaer v. Bull*, 1 Johns. Cas. 81, it was held, "that a deed executed in pursuance of a previous contract for the same premises, is good by relation from the time of making the contract, so as to render valid every intermediate sale or disposition of the land by the grantees." *Jackson v. Raymond*, 1 Johns. Cas. 85, note; *Case v. De Goes*, 3 Cai. 262, per Thompson, J.; *Jackson v. Bard*, 4 Johns. 234 [4 Am. Dec. 267]. In *Heath v. Ross*, 12 Johns. 140, a patent for land, dated the fourth of December, but which did not pass the great seal until the twenty-eighth, was held to relate back, as between the parties, so as to vest the title in the

patentee from the date. *Jackson ex dem. Noah v. Dickenson & Thompson*, 15 Johns. 309 [8 Am. Dec. 236], was the case of a sheriff's sale made on the first of March, and the deed not delivered until the ninth. On the tenth of the same month, a mortgagee of the same land filed a bill of foreclosure, without making the purchaser at the sheriff's sale a party. It was held that the deed related back to the time of the sale; that the purchaser's title was acquired previous to the filing of the bill, and he was not precluded from contesting the validity of the mortgage in an action of ejectment. The court say: "The subsequent delivery of the deed, being mere matter of form, must have relation back to the time of purchase at the sheriff's sale:" *Johnson v. Stagg*, 2 Johns. 250, per Kent, C. J., S. P.

But the lapse of time between the sale and the giving of the deeds is objected to their validity, or, at all events, to their relation back to the time of sale; and the observations of Chancellor Lansing in *Catlin v. Jackson*, in error, 8 Johns. 552, 553, are supposed to countenance the objection. But in that case, the purchaser at the sheriff's sale had never paid his bid, and the deed was delivered to a third person as an escrow to take effect, when the consideration money should be paid, without any time being limited for the purpose. The remarks of the chancellor are applicable to that state of facts. But in this case the consideration money was paid by the purchaser. He had done everything to entitle him to a deed. The money must be presumed to have been paid over by the sheriff to the plaintiff in the execution, in satisfaction of the debt, and, of course, for the benefit of the estate of A. McMichael, whom the lessors of the plaintiff represent. The essential and important part of the sheriff's duty had then been performed, and nothing remained to be done but the formal act of delivering the deed, the purchaser having been in possession, as we have right to presume, from the day of the sale. The lapse of time under such circumstances, and between these parties, can afford no objection either to the validity of the deed or to its relation back to the time of the sale.

But admitting that by relation it is to be considered as having been given at the time of the sale, does that dispense with the necessity of pleading the fact of delivery according to its truth, *puis darrein continuance*? I am of opinion that it does. The defense relied on was the title acquired under the sheriff's sale. When did that title vest in the defendant, is the point of inquiry. If before the commencement of the suit, it was available

under the general issue. If after issue joined, it should have been pleaded *puis darrein continuance*; and the date or time of delivery of one of the evidences of title, is perfectly immaterial. The legal effect and operation of such delivery is the matter of defense, and not the instrument itself. The legal effect of the delivery, then, in this case, having been to vest the title in the defendant by relation, as of the second of October, 1818, the matter of defense did not arise subsequent to the joining of the issue, and need not be pleaded *puis darrein continuance*. I am of opinion, therefore, that the judge erred in rejecting the sheriff's deeds on that ground, and that a new trial must be granted.

New trial granted.

RELATION IS A FICTION OF LAW by which an act or instrument is, from necessity and for the advancement of justice, permitted to take effect, at least to some intent, at a time anterior to its actual performance or execution: *Butler and Baker's case*, 3 Co. 23; *Menville's case*, 13 Id. 19; *Doe v. Howland*, 8 Cow. 280, per P. A. Jay, *arguendo*.

CONDITIONS OF ITS APPLICATION.—The application of this doctrine is subject to several important conditions and qualifications, some of which will be here referred to:

1. NECESSITY.—It is to be noted that the doctrine of relation is never applied except when necessary to give full effect to an act or instrument, whose operation might otherwise be partly defeated: See *Butler and Baker's case*, 3 Co. 23; *Menville's case*, 13 Id. 19.

2. PROMOTION OF JUSTICE.—Another inflexible rule governing the application of this doctrine, is that it is not to be resorted to except for the advancement of right and justice. "The doctrine of relation being a fiction of law, is to be resorted to only for the advancement of justice:" Potter, J., in *Pierce v. Hall*, 41 Barb. 142. "The law will never make such a construction to advance a wrong which the law abhorreth, or to defeat collateral acts which are lawful:" *Menville's case*, 13 Co. 19. "No relation shall make that tortious which was lawful, for, as it hath been said, relations are fictions in law which will never do wrong:" *Butler and Baker's case*, 3 Co. 23; see, also, Co. Inst., Book 2, c. 14, 150, a.

3. NOT ALLOWED TO PREJUDICE STRANGERS.—It follows from what has been already stated, that this doctrine is not to be applied to the injury of those who are strangers to the act or instrument. Hence, where it will have such an effect, it will not be applied at all, or its application will be limited in its operation to those who are parties and privies. Thus, in *Menville's case*, 13 Co. 19, a husband being seised of certain lands, levied a fine with proclamations, and was afterwards convicted of high treason, and outlawed and then died, and the conusees conveyed the lands to the queen. After more than five years had elapsed from the death, the attainder was reversed on application of the heirs, and upon the widow's suing to the queen to be allowed her dower in the said lands, it was resolved: "Although that to some intent the reversal (of the attainder) hath relation, yet to bar the wife of her dower by fiction of law, by the fine with proclamations, and five years passed after the death of her husband, when, in truth, she had not cause of action, nor any

right or title, so long as the attainder stood in force, should be to do wrong by a fiction of law, and to bar the wife, who was a mere stranger, and had not any means to have any relief until the attainder was reversed." So in *Case v. De Goes*, 3 Cai. 261, where a writ of restitution was awarded on an indictment for a forcible entry and detainer, which was afterwards quashed for irregularity, it was held that this would not relate back to the awarding of the original writ, so as to give the real owner a right of action against persons, who, in the meantime, had cut timber on the land under a license from the party in possession, because the law would not, by relation, convert an act, innocent when it was done, into a trespass.

So, in *Pratt v. Potter*, 21 Barb. 589, where it was held that a deed would not be permitted to take effect by relation from the day of its date, prior to its execution by all the parties, where the result would be to make a stranger a trespasser who had gone on the land under a license from one of the grantors. And in *Jackson v. Douglass*, 5 Cow. 458, it is said, in general terms, that relation is "a fiction of law, and is never adopted when third persons who are neither parties or privies are to be affected by it." In *Fife v. Doe*, 1 Blackf. 127, it was held that a conveyance made pursuant to a prior contract would not be allowed to take effect by relation from the date of such contract to the prejudice of third persons. To the same effect is *Jackson v. Bard*, 4 Johns. 230 [4 Am. Dec. 267]. So in *Reynolds v. Darling*, 42 Barb. 418, where a sheriff's deed was executed more than ten years after the sale, and the judgment-debtor, in the meantime, sold the land to a *bona fide* purchaser, who had no notice of the previous sale, though he knew of the existence of the judgment, and that part of it was unpaid. But the doctrine of relation will be applied as against third persons having notice. Thus, it was held in *Vancourt v. Moore*, 26 Mo. 92, *per* Napton, J., that a decree of specific performance might operate as a conveyance by relation from the date of the original agreement, in order to give the plaintiff the benefit of a broken covenant of warranty made by a third person who had constructive notice of the plaintiff's title. And it seems to have been the opinion of Ventris, J., in *Thompson v. Leach*, 2 Vent. 200, that the mere fact that there might be incidental loss or damage to third persons, would not prevent the application of this doctrine. The majority of the court, however, in that case refused to apply the doctrine to a sale and deed of a particular estate upon which depended a contingent remainder, where the deed was not actually delivered until after the remainder became vested: See 3 Washb. Real Prop. 310, 4th ed.

And while this doctrine will not, in general, be permitted to operate to the injury of strangers, neither will mere wrong-doers be permitted to take advantage of it to escape liability. Thus, in *Mervill's case*, 13 Co. 9, it was said, by way of illustration, that where a judgment is reversed on writ of error, the reversal takes effect by relation from the entry of the judgment reversed, so as to entitle the plaintiff in error to recover mesne profits from the defendant in error, but not so as to deprive the defendant in error of a right of action against a third person for a trespass committed on the land in the mean time; for as the plaintiff in error has no right of action except against the defendant in error, the result of the strict application of the doctrine to such a case would be to relieve the trespasser from all responsibility for his wrongful act.

4. NOT APPLIED TO VOID ACT.—It is another limitation of the doctrine of relation that it cannot be applied to a void act. Such an act will not be made good by relation: *Berrington v. Parkhurst*, 13 East, 489; nor can a subsequent

act relate to it: *Doe v. Howland*, 8 Cow. 277. Says Savage, C. J., in the case last cited: "In all cases where a subsequent act is held to relate back to a thing antecedent, there must be something to which relation may be had; something inchoate, imperfect, but still something." Therefore, where a wife undertook to convey her lands by joining in a deed with her husband, but without the official acknowledgment required by law, and, after her husband's death, went before the proper officer and acknowledged that she acted freely and without any threats or compulsion of her husband, it was held that the original execution of the deed being void, the subsequent acknowledgment could not relate back to it, but that it nevertheless made such deed effectual to pass her interest at the time of the acknowledgment; *Doe v. Howland*, 8 Cow. 277; *Jackson v. Stevens*, 16 Johns. 110.

5. APPLICATION MAY BE PARTIAL.—What has already been said indicates that where this doctrine is applied it need not be so to every intent and for every purpose. An instrument may be held to take effect from the time of its execution for certain purposes, and to operate by relation from some prior date for certain other purposes. As was said in *Menville's case*, 13 Co. 19: "Sometimes, by construction of law, a thing shall relate *ab initio* to some intent, and to some intent not." Hence, as was held in several of the cases already cited, the fiction of relation may be applied to an act or instrument as between parties and privies, while as to strangers its operation may be rigidly limited to the period of its actual performance or execution.

DOCTRINE FOUNDED ON EQUITABLE PRINCIPLES.—The observations which have been made above on the general conditions and limitations of this doctrine, show that it is founded on broad principles of equity. It is accordingly held in *Hammond v. Warfield*, 2 Har. & J. 151, that as the doctrine is based on equitable grounds, a party who wishes to claim the benefit of it must show an equity in his favor. It is to be applied only where it appears affirmatively that it is necessary to give some act or instrument the full effect and operation, which the parties are presumed to have intended it to have, and which right and justice require that it should have. And the doctrine is sufficiently plastic to meet the exigencies and answer the equities of each particular case. Its nature and operation, however, will be best illustrated by an examination of the cases in which it has been applied. It will be useful, therefore, to present here a brief view of some of the decisions on this subject.

APPLIED TO EXECUTION SALES.—The most frequent cases in which the doctrine of relation is applied, are those of execution sales. This is necessarily so; for, since such sales are not like ordinary private transactions, consummated at once, but require several distinct acts, or steps, as well as considerable time for their completion, it would be easy to defeat their object, and to deprive purchasers of the benefit of their purchases, if the deeds, when executed, did not take effect from some anterior period; particularly when it is remembered that such proceedings are generally against the will of the former owner, and that he will be likely to defeat them if he can. It is found necessary, therefore, to allow such sales, when consummated by proper conveyances, to relate to, and operate from, the inception of the liens which they are designed to enforce. Accordingly it may be stated in general terms that for the purpose of determining what title passes, and defeating intermediate conveyances and incumbrances by the debtor, a sheriff's deed, when executed, takes effect by relation from the commencement of the lien of the judgment; *Freeman on Executions*, sec. 333; *Rorer on Jud. Sales*, 2d ed., sec. 366. This period varies considerably, however, in the several states.

In some, the lien of a judgment begins from the time when it is docketed; in others, from the delivery of the execution to the sheriff; in others again, from the levy, etc: Freeman on Executions, sec. 333. But at whatever period the lien begins, to that period the sheriff's deed will have relation, so far as is necessary to secure the purchaser's title, although as to the right to possession, or to the rents and profits, or for other purposes, such deed may operate only from the time when the purchaser became absolutely entitled to it, or, perhaps, from its execution: *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386; *Kirk v. Vonberg*, 34 Ill. 440; *Bank of Missouri v. Wells*, 12 Mo. 361.

It is well settled in a number of the states that a sheriff's deed takes effect by relation from the date of the docketing of the judgment so far as to defeat intermediate alienations and incumbrances, although it does not absolutely divest the title from that time: *Smith v. Allen*, 1 Blackf. 22; *Doe v. Horn*, 1 Ind. 363; *Royers v. Brent*, 5 Gilm. 573; *Stephens v. Illinois Mut. Fire Ins. Co.*, 43 Ill. 327; *Sweezy v. Chandler*, 11 Id. 445; *Johnson v. Baker*, 36 Id. 98; *McCormick v. McMurtrie*, 4 Watta. 192; *Fehley v. Barr*, 66 Pa. St. 196; *Martin v. Martin*, 7 Md. 368. But where the land on which the execution is levied lies in a different county from that in which the judgment is docketed, the sale relates only to the date of the levy: *Reichart v. McClure*, 23 Ill. 516; *McClure v. Engelhardt*, 17 Id. 47. And it is held in Illinois that notwithstanding the sale and its relation to the inception of the lien, the absolute divestiture of title takes effect only from the expiration of the period allowed to redeem, and that until then the debtor has an insurable interest in the premises: *Stephens v. Illinois Mut. Fire Ins. Co.*, 43 Ill. 327. But where a judgment becomes a lien on realty as well as personalty only from the delivery of the execution to the sheriff, a sale thereunder relates only to that time for the purpose of passing such title as the debtor then had, as in Kentucky: *Savage v. Best*, 3 How. U. S. 110, and cases cited; *Million v. Riley*, 1 Dana, 359. In North Carolina and Tennessee it has been held that the title of a purchaser at a sale on a justice's execution relates only to the date of the levy on the land sold: *Lash v. Gibson*, 1 Murph. 266; *Ellar v. Ray*, 2 Hawks, 568; *Parker v. Swan*, 1 Humph. 80. In Massachusetts, Maine and New Hampshire, it has been decided that a title by execution extended on land "takes effect by relation from the time when the proceedings commence, if these are regularly continued and if the extent is subsequently registered within the appointed time;" that is, the subsequent proceedings all relate to the seizure, if that was in time: *Brown v. Marine Bank*, 11 Mass. 153; *Heywood v. Hildreth*, 9 Id. 393; *Hall v. Crocker*, 3 Met. 245; *Hall v. Hoxie*, Id. 251; *Taylor v. Robinson*, 2 Allen, 562; *French v. Allen*, 50 Me. 437; *Clement v. Garland*, 53 Id. 427; *Howard v. Daniels*, 2 N. H. 137. So, even if the original seizure was unlawful, thus rendering the entire proceedings void: *Clement v. Garland*, 53 Me. 427. But this relation to the commencement of the proceedings under such an execution will not be permitted to deprive the creditor of the right to compute interest on the debt up to the completion of the levy: *Taylor v. Robinson*, 2 Allen, 562.

The doctrine of the principal case, that a sheriff's deed, when executed, takes effect by relation from the day of sale, was subsequently modified to some extent in New York by the enactment of a statute allowing a judgment-debtor fifteen months after a sale of his realty to redeem the same, and permitting him to retain possession during that time. The present New York doctrine is that the relation of a sheriff's deed to the day of sale has only a qualified operation. The relation is allowed only so far as necessary to protect the purchaser's title from intermediate alienations and incumbrances,

and to enable him to prevent waste upon the premises, etc. To this extent it was expressly provided by statute some years after the decision in the principal case, that a sheriff's deed should take effect by relation to the day of sale: *Thomas v. Crofut*, 14 N. Y. 474. But so far as the right of possession is concerned, and for most other purposes, the deed relates no farther back than to the expiration of the period of redemption. Says Bronson, C. J., in *Rick v. Baker*, 3 Denio, 80: "On judgment sales of real estate prior to the redemption law of 1820, the sheriff's deed, though given long afterwards, related back to the time of the sale: *Jackson v. Ramsay*, 3 Cow. 75. But after the law gave the debtor and his creditors fifteen months to redeem, it was held that the deed did not retrospect to the time of the sale, so as to give the purchaser a right to the rents and profits during the fifteen months: *Bissell v. Payn*, 20 Johns. 3. For most purposes it only relates back to the expiration of the time for redemption: *Klock v. Cronkhite*, 1 Hill, 107. The present statute expressly provides that the debtor may have the use and enjoyment of the property during the fifteen months, and that his title shall not be divested until the expiration of that time."

It was held, however, in that case, that the deed would relate to the day of sale, so far at least as to enable the purchaser to bring an action of waste or trover against the debtor for destroying timber on the premises after the sale, but before the deed; but not so as to entitle him to maintain replevin in the *cepit* for the timber taken away, since that action, like trespass, was founded on possession. So, in *Everton v. Sawyer*, 2 Wend. 507, it was held that since the redemption acts, a sheriff's deed would not relate back beyond the expiration of the period allowed to redeem, so as to enable the purchaser to take possession. Subject, however, to the qualification introduced by the statutes providing for the redemption of land sold on execution, the doctrine in New York still is, as laid down in the principal case, that the sheriff's deed relates back to the day of sale: *Wright v. Douglass*, 2 N. Y. 373; *Cook v. Travis*, 20 Id. 400; *Nellis v. Lathrop*, 22 Wend. 121; *Reynolds v. Darling*, 42 Barb. 418; *Holman v. Holman*, 66 Id. 215; *Wilson v. Davol*, 5 Bosw. 619. Thus, where the purchaser, before receiving the sheriff's deed, sold and conveyed the land to another person, and after receiving the deed conveyed the same land to a different person, it was held that the sheriff's deed, taking effect by relation from the day of sale, the title thereunder inured to the benefit of the first grantee, so as to defeat the second conveyance: *Holman v. Holman*, 66 Barb. 215. And a sheriff's deed may operate by relation from the day of sale, even where it is not executed for ten years: *Reynolds v. Darling*, 42 Barb. 418. Or for thirty years: *Cook v. Travis*, 20 N. Y. 400. But not as against *bona fide* purchasers after the expiration of the judgment lien, for the deed, not being recorded, is void as to them: *Cook v. Travis*, 20 N. Y. 400. And when the title is perfected by a conveyance, it extinguishes a lease given by the debtor between the sale and deed: *Wilson v. Davol*, 5 Bosw. 619.

In several of the other states, also, it is held that a sheriff's deed takes effect by relation from the date of the sale: *Alexander v. Merry*, 9 Mo. 510; *Crowley v. Wallace*, 12 Id. 143, approving and following the principal case; *Winston v. Affalter*, 49 Id. 263; *Shumate v. Reavis*, Id. 333; *Leach v. Koenig*, 55 Id. 451 (but not against strangers without notice: *Strain v. Murphy*, 49 Id. 337); *Miles v. Wilson*, 3 Harring. 382; *Robinson v. Robinson*, Id. 391; *Davidson v. Frew*, 3 Dev. 3; *Hoke v. Henderson*, Id. 12; *Dobson v. Murphy*, 4 Dev. & Bat. 586; *Testerman v. Poe*, 2 Id. 103; *Richardson v. Thornton*, 7 Jones, N. C. 458; *Kingman v. Glover*, 3 Rich. S. C. 27; *Boyd v. Longworth* 11

Ohio, 235; *Wood v. Turner*, 7 Humph. 517. Hence, the sale will not be set aside because of waste committed by the debtor between the sale and the deed, because the title being in the purchaser, after conveyance, by relation, he might have enjoined the waste, or he may have a remedy by action for the injury: *Miles v. Wilson*, 3 Harring. 382. And it was held in *Kingman v. Glover*, 3 Rich. S. C. 27, that the deed will operate by relation from the day of sale, so as to shield the purchaser from liability for taking possession in the meantime, but this cannot be so where the debtor is entitled to possession, as in New York, during the period allowed for redemption. And where, for any cause, the deed fails to convey the title, it may still operate, by relation, to give color of title from the day of sale: *Rogers v. Mabe*, 4 Dev. 180. In *Kane v. Mackin*, 9 S. & M. (Miss.) 387, it was held that the delivery of a sheriff's deed some time after its execution, would relate back to such execution.

It scarcely needs to be stated that one result of the application of the doctrine of relation in cases of this kind is that the right of a purchaser at a sheriff's sale is not to be defeated or injuriously affected by any disclaimer of title, or by any attornment to a stranger made by the debtor after the lien of the judgment has attached: *Campbell v. Lowe*, 9 Md. 500; *Wilson v. Miller*, 32 Id. 297. These, as well as all other attempts of the debtor to embarrass or incumber the title after the commencement of the lien, will be defeated by the relation.

AFFECTING RIGHT OF POSSESSION.—It is clear that, although it may be necessary for the protection of purchasers at execution sales that a sheriff's deed should be allowed to take effect, so far as the title is concerned, by relation, from the sale or from some other period anterior to its execution, it need not have any such operation as respects the right of possession and other rights growing out of that right. In other words, such a deed may have relation as to the title, without having it as to the right of possession and other kindred rights. Thus, under the redemption acts in New York, as already noticed, the judgment-debtor is entitled to the possession during the period allowed for redemption, and although when the sheriff's deed is executed it relates back to the sale so far as necessary to secure the purchaser's title, it does not so operate as to give him any right to the possession, or to the fruits of possession, in the interval between the sale and the deed; nor can he maintain any action, such as trespass or replevin, which is founded upon possession, or right of possession, for any injury committed during that interval. This distinction is carefully observed in *Rich v. Baker*, 3 Denio, 80, referred to above, and also in *Thomas v. Crofut*, 14 N. Y. 474, where it was held that a redemptioner of land sold on execution might, after receiving the sheriff's deed, maintain an action against the original purchaser for waste in cutting and carrying away timber after the sale, waste not being a possessory action like trespass. So in Pennsylvania it is held that before the sheriff's deed is executed, the purchaser is not entitled to possession, nor can he institute any proceeding, or make any demand, or give any notice preparatory to an attempt to recover possession: *Hawk v. Stouch*, 5 Serg. & R. 157; and he is entitled to rent only from the time the sheriff's deed is acknowledged, for until then the sale is an imperfect contract: *Scheerer v. Stanley*, 3 Rawle, 276. But where rent becomes payable after the execution of the deed, the purchaser is entitled to it, although a part of it may be for a period anterior to the execution of the deed, for the debt, being entire, will not be apportioned: *Bank of Pennsylvania v. Wise*, 3 Watts, 394; *Braddee v. Wiley*, 10 Id. 362; *Hart v. Israel*, 2 P. A. Browne, 22. And as the purchaser is not entitled to the pos-

session or profits before the deed is executed, neither is he liable for ground-rents accruing in the meantime: *Thomas v. Connell*, 5 Pa. St. 13. So in Michigan it is held that until the execution of the sheriff's deed the purchaser's title is not complete, and, therefore, he can not recover for the use and occupation of the premises from the debtor, who continues in possession: *Whipple v. Farrar*, 3 Mich. 447; see, also, *Gorham v. Wing*, 10 Id. 486. So in North Carolina it is held, notwithstanding the relation of the sheriff's deed to the sale, so far as the title is concerned, that it will not protect the purchaser from an action of trespass for an entry prior to receiving the deed, the debtor being in possession: *Presnell v. Ramsour*, 8 Ired. 505. But see to the contrary: *Kingman v. Glover*, 3 Rich. S. C. 27, above cited. And in *McMillan v. Hasley*, 2 N. Car. Law Rep. 89, it was decided that a purchaser at sheriff's sale can not maintain an action for a trespass committed before the deed was executed. So in Wisconsin it has been determined that a purchaser at an execution sale is entitled to the profits of the estate, as against the debtor, only from the execution of the deed: *Swift v. Agnes*, 33 Wis. 223. In Maryland it is held, in accordance with the doctrine of *Bank of Pennsylvania v. Wise*, 3 Watts, 394, above cited, that a purchaser at sheriff's sale may recover rent falling due after the execution of the deed, upon a lease made by the debtor, notwithstanding the fact that the debtor may have drawn orders in anticipation of it, which the tenant has accepted; for there can be no apportionment in such a case: *Martin v. Martin*, 7 Md. 368.

NECESSITY OF SHERIFF'S DEED NOT OBIATED BY RELATION.—Notwithstanding the fact that the sheriff's deed, when executed, may, for the purpose of securing to the purchaser the full benefit of his bargain, take effect by relation and pass the title which the debtor had at the day of sale, or when the lien attached, still the relation does not do away with the necessity of a deed. The general rule is that the full title does not pass until the deed is executed; the doctrine of relation simply antedates it as to the title conveyed. It is the deed that conveys; relation merely fixes the time from which it is to operate for certain necessary purposes. That a deed is, in such cases, generally held essential to pass the title, see *Freeman on Executions*, 324. See also *Gorham v. Wing*, 10 Mich. 486; *Hayes v. N. Y. Mining Co.*, 2 Col. 273. But in several of the states the doctrine is that the full title passes when the sale is made and confirmed, and the purchase-money paid; and that the deed is merely evidence that the title has passed: See *Freeman on Executions*, sec. 324; see, also, *Jouet v. Mortimer*, 29 La. An. 206.

ADMISSIBILITY OF SHERIFF'S DEED EXECUTED AFTER SUIT.—The rule laid down in the principal case that owing to the effect of the doctrine of relation a sheriff's deed executed after an action is commenced involving the title, is admissible in such action under the general issue, without a plea of *puis darrein continuance*, is approved and followed in *Crowley v. Wallace*, 12 Mo. 143, and in *Winston v. Affalter*, 49 Id. 263. In *Wallace v. Lawrence*, 1 Wash. C. C. 503, it was held also that a sheriff's deed which was executed, though not recorded, before the action was commenced, was admissible in evidence. In California and North Carolina, however, it is held that a sheriff's deed executed after the commencement of an action involving the title is not admissible in evidence in such action without a supplemental complaint, or answer, or a plea of *puis darrein continuance*: *Bagley v. Ward*, 37 Cal. 121; *McMinn v. O'Connor*, 27 Id. 247; *Moss v. Shear*, 30 Id. 472; *Presnell v. Ramsour*, 8 Ired. 505. The doctrine of these latter decisions would seem to be the preferable one if the deed in such cases is to be regarded as actually passing the title, and not merely as evidence that it has

passed. The mere fact that the deed when executed passes, by relation, the same title that it would have passed if it had been actually executed at some previous date, does not appear to be sufficient ground to warrant its admission under the original issue. Notwithstanding the relation, the purchaser does not get the title until he gets the deed, although when he gets it he gets it as of a former date. It is to be remembered that the fiction of relation is never to be extended beyond the actual necessity of the case, and there seems to be no necessity for this particular application of it.

APPLICATION OF DOCTRINE IN ATTACHMENT CASES.—It has been held by eminent judges that an attachment, before the recovery of judgment, is not an actual lien, but only a conditional or provisional one, because until then it is not certain that there is any debt, or if so, what the amount of it is. See the learned and elaborate opinion of Mr. Justice Story, in *Ex parte Foster*, 2 Story, 131. And see, to the contrary: *Kittredge v. Warren*, 14 N. H. 509; *Fisher v. Vose*, 3 Rob. (La.) 457. But, however this may be, it is at least certain that since an attachment is a seizure of an alleged debtor's property for the purpose of holding it to satisfy such judgment as the plaintiff may recover, it is essential that when the judgment is recovered and the property taken in execution and sold thereon, the title given to the purchaser should be free of any incumbrances placed thereon by the debtor subsequent to the attachment. To meet this necessity, and effect this purpose, the doctrine of relation is applied, and a sale on execution in an attachment suit is held to relate back to the levy of the attachment and to pass such title as the debtor then had: *Farmer's Bank v. Beaston*, 7 Gill & J. 421; *Cockey v. Milne*, 16 Md. 200; *Lackey v. Seibert*, 23 Mo. 85. In Indiana, it having been provided by statute that after the levy of an attachment other creditors may have the benefit of it by filing their claims, it was held, in *Shirk v. Wilson*, 13 Ind. 129, that the filing of such claims related back to the beginning of the attachment, so as to give the creditors so filing a right to have their debts satisfied out of the attached property before a judgment recovered by another creditor prior to the filing, but after the attachment.

FORECLOSURE SALE.—In accordance with the general doctrine, where a lien by mortgage or otherwise is foreclosed and the property condemned and sold to satisfy it, the conveyance executed pursuant to the decree takes effect by relation from the inception of the lien, so far as to cut out intervening conveyances and incumbrances, and passes the title, which the defendant in the decree then had: *Fuller v. Van Geesen*, 4 Hill. 171; *Bell v. Hall*, 4 G. Gr. 68; *Hutchings v. Ebeler*, 46 Ill. 557; *Sands v. Pfeiffer*, 10 Cal. 258; *Osterberg v. Union Trust Co.*, 93 U. S. 424. The purchaser at such sale therefore acquires the right to fixtures placed on the premises by the mortgagor after the mortgage; and, after receiving his deed, he may maintain replevin against the mortgagor for removing them: *Sands v. Pfeiffer*, 10 Cal. 258. But see *Hill v. Gwin*, 51 Id. 47. But a foreclosure and sale will not displace a lien for taxes, attaching after the mortgage, for this is a claim against the property and not against the mortgagor: *Osterberg v. Union Trust Co.*, 93 U. S. 424.

APPLICATION OF DOCTRINE TO OTHER CONVEYANCES.—Outside the domain of judicial proceedings it may be stated generally that when a transfer of title is the result of several successive steps or transactions, the conveyance may be held to take effect, by relation, from the first substantive act when such a course becomes necessary in furtherance of justice. "There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation:" 5

Cruise on Real Prop. 510, 511, quoted with approval by Catron, J., in *Landes v. Brant*, 10 How. U. S. 348.

RELATION OF DEED TO PRIOR CONTRACT.—The case of a conveyance executed in pursuance of a prior contract is one in which the doctrine of relation is often applied. For instance, if it is claimed that a deed is invalid because at the time of its execution a third person was in adverse possession, it will be held for the purpose of giving effect to the conveyance that it relates to, and operates from the contract of sale if that was prior to the adverse possession. Benson, J., in *Jackson v. Raymond*, reported in the note to *Jackson v. Bull*, 1 Johns. Ca. 85. Kent, J., in *Jackson v. Bull*, refers to this as “a just rule of construction.” So, a conveyance will be held to relate back to the original contract where it is necessary to maintain an intermediate mortgage, sale or other disposition of the land by the grantee: *Jackson v. Bull*, 1 Johns. Ca. 81; *Johnson v. Stagg*, 2 Johns. 510.

DOCTRINE APPLIED TO ESCROWS.—Where a writing is intrusted to a third person as the deed of the grantor therein to be delivered to the grantee upon the payment of a sum of money, and is so delivered, it will be allowed to operate, by relation, from its first delivery where it is necessary to uphold the conveyance: *Termes de la Ley*, tit. “Relation.” So, where a grantor delivers his deed to a third person to be delivered to the grantee after the grantor's death, it will be held to operate from such first delivery, since otherwise it could not take effect at all: *Wheelwright v. Wheelwright*, 3 Am. Dec. 66, and cases cited in note; *Hatch v. Hatch*, 6 Id. 67; *O'Kelly v. O'Kelly*, 8 Met. 436; *Foster v. Mansfield*, 2 Id. 412. And a deed delivered as an escrow will be allowed to take effect by relation from such delivery, if it is necessary to sustain intermediate conveyances, but not where it would operate to defeat a *bona fide* mortgage to a third person: *Frost v. Beekman*, 1 Johns. Ch. 268; reversed on another point, in *Beekman v. Frost*, 9 Am. Dec. 246.

A GOVERNMENT PATENT WILL RELATE to the date of the original certificate of purchase, and will be held to take effect from that date, where such a construction is necessary to sustain a sale made by the grantee, or an execution sale of his interest in the land: *Carroll v. Safford*, 3 How. U. S. 441; *Cavender v. Smith*, 3 G. Greene, 349; S. C., 5 Iowa, 157; *Rogers v. Brent*, 5 Gilm. 573; *Hammond v. Warfield*, 2 Har. & J. 151, 158. So, in *Landes v. Brent*, 10 How. U. S. 348, where one had taken all the initiatory steps to obtain a grant of land in Louisiana, under the act of March 2, 1805, and his title thereto was seized and sold on execution, it was held, on the subsequent confirmation of the title by the government, that in order to support the execution sale, the confirmation would take effect by relation to the grantee's first acts, so as to make him the owner at the time of the sale. In *Heath v. Ross*, 12 Johns. 140, it was held that a patent for state land, which was dated December 4, 1810, but did not pass the secretary's office until December 28, would operate by relation from its date, in order to enable the patentee to maintain an action against a mere wrong-doer for cutting and carrying away timber in the meantime. Ordinarily, however, a patent from the state will date from the time of its passing the secretary's office, unless a prior contract can be shown, to which it may relate: *Jackson v. Douglass*, 5 Cow. 458. In *Howard v. Moale*, 2 Har. & J. 249, it was held that a grant of escheat land would relate back to the original grant.

APPLICATION OF DOCTRINE UNDER RECORDING ACTS.—It is laid down in 2 Greenleaf's Cruise on Real Prop. 441, that under the enrollment acts a deed of bargain and sale does not pass the title until it is duly enrolled, but

that when enrolled it passes the title by relation to its original execution. And the general rule is, that where conveyances are required to be recorded within a certain time, or within a reasonable time, such conveyances, if recorded in due time, take effect not in the order of recording, but by relation to the order of their execution: 4 Kent's Com. 457; *Brown v. Baldrige*, Meigs (Tenn.), 1; *Beers v. Hawley*, 2 Conn. 467. And if not recorded, actual notice to subsequent grantees or incumbrancers will serve the same purpose: *Farnsworth v. Child*, 3 Am. Dec. 249; *Priest v. Rice*, 11 Id. 156.

OTHER INSTANCES OF APPLICATION OF DOCTRINE.—In *Berly v. Taylor*, 5 Hill, 577, it was held that where a trust is created for the benefit of a person without his knowledge, his subsequent adoption of it will relate back to its creation, for the purpose of securing his rights under it; as where goods were shipped by a failing debtor to a third person for the use of one of his creditors, but without the latter's knowledge. In *Lighbody v. North Am. Ins. Co.*, 23 Wend. 18, it was decided that if a policy of insurance was dated on the day the premium was paid, it would take effect, by relation, from that day, though it was not delivered until afterwards, where this construction was necessary to give the insured the full benefit of his contract. Where an administrator was required, on executing a mortgage on the trust-estate, to give a bond, and such a bond was in fact executed and dated on the day of the making of a mortgage, though not filed until seven days afterwards, it was held to operate by relation from its date, in order to sustain the validity of the proceedings: *Fox v. Lipe*, 24 Wend. 164. A deed, executed and acknowledged long before its delivery, may be held to take effect by relation, from the date of the acknowledgment, in order to support a mortgage made by the grantee in the meantime, and in furtherance of justice: *Judd v. Seekins*, 62 N. Y. 266. A confirmatory deed, executed by an administrator to cure defects in a prior deed, may be held to relate to the day of sale, when necessary to sustain the proceedings: *Sheldon v. Wright*, 7 Barb. 39. In *Hodges v. Spicer*, 79 N. C. 223, it appeared that a father executed deeds to certain tracts of land to his sons, A. and B. A. lost his deed before it was recorded; afterwards the sons exchanged lands, and the father gave B. a deed to the tract originally conveyed to A., but reserved to himself a life-estate therein, and it was held that this deed related back to the date of the lost deed, and that the father's creditors could not complain of the reservation, if, when the first deed was executed, sufficient property was retained to pay existing debts, although the father had afterwards become insolvent. For other examples of the application of the doctrine see *Butler and Baker's case*, 3 Co. 27, 28, 29; see, also, *Doe v. Telling*, 2 East, 257, for a case where the court refused to apply the doctrine. In *Pierce v. Hall*, 41 Barb. 142, it was doubted whether a deed from the comptroller for land sold for taxes ought to be allowed to operate by relation to the day of sale in order to enable the purchaser to recover from a trespasser property severed from the freehold between the sale and the deed; but the point was not directly decided.

In nearly all the New York decisions which have been here cited, and in many of those from the courts of other states, the principal case is referred to as an authority upon this whole subject of relation. Owing to a mistake in printing the original report, the case is sometimes erroneously cited as *Jackson v. McMichael*, or *Jackson v. McCall*.

GARDNER v. BUCKBEE.

[3 COWEN, 120.]

JUDGMENT, ESTOPPEL BY.—The judgment of a court of concurrent jurisdiction, directly upon the point is, as a plea in bar or evidence, conclusive between the same parties upon the same matter directly in question in another suit.

EVIDENCE TO SHOW WHAT HAS BEEN ADJUDICATED.—Evidence, extrinsic the record, is admissible to show what matters, embraced within the issues, were passed upon in a former action.

ERROR to the common pleas, in an action brought by the defendant in error on a certain promissory note; the defense being that the action was barred by a judgment between the same parties, with reference to the same subject-matter, in the marine court, but the court below thought the judgment no bar. The facts are stated in the opinion.

J. Anthon, for the plaintiff in error, contended: 1. That the judgment in the marine court was a complete bar: *Duchess of Kingston's case*, 11 St. Tr. 261; 1 Phil. Ev. 223; *Gahan v. Main-gay*, 1 Irish T. R. 54; *Wright v. Deklyn*, 1 Pet. C. C. 202; *Shelton v. Barbour*, 2 Wash. 64; *Croudson v. Leonard*, 4 Cranch, 436; *Outram v. Morewood*, 3 East, 345; 2. That the record was admissible without being specially pleaded: *Bird v. Randall*, 3 Burr. 1353; *per Lord Mansfield: Maury v. Harris*, 2 Johns. 28.

J. Wyckoff, *contra*, insisted: 1. That the judgment should have been specially pleaded: *Vooght v. Winch*, 2 B. & A. 662; 1 Phil. Ev. 225, note; 2. That it should have been pleaded by way of estoppel; 3. That the judgment in the marine court was general and indefinite, and upon a different obligation, etc., and therefore no bar: 1 Phil. Ev. 218; *Id.* 223, and cases cited.

By Court, **WOODWORTH, J.** This is a writ of error to the common pleas of the city of New York. Buckbee, plaintiff in the court below, commenced an action against Gardner on a promissory note. The defendant pleaded the general issue, and gave notice of special matter, that the note was given in part payment for a vessel called the *Tiger*, sold to the defendant and others, and alleged fraud by the plaintiff in the sale; the vessel being at the time rotten and unseaworthy, and that known to the plaintiff. At the trial the plaintiff admitted that the note was one of two promissory notes for the same amount, given by the defendant and two others as the consideration upon the sale of the vessel.

The defendant offered to prove, in bar of the plaintiff's demand, that the plaintiff impleaded the defendant, in the marine court of the city of New York, upon a promissory note, bearing even date, and for the same amount as the one now in question, signed by the same parties, and given for the consideration-money; that, upon the trial in the marine court, the fraud of the plaintiff in the sale was the only point in question; and that judgment had been rendered in that court in favor of the defendant, on the ground that the sale was fraudulent. The plaintiff objected to the testimony, because the judgment had not been pleaded, or notice given; and that the note on which the present suit was brought is a different instrument from that declared on in the marine court. The judge declared the evidence was not admissible in that stage of the cause, but might be offered after proof to the jury of the fraud and in support thereof, to which the defendant excepted.

The defendant, then, in proof of the fraud, offered in evidence the record of the judgment in the marine court, in favor of the defendant, on the other note. By the record, it appeared that the defendant pleaded the general issue, and gave notice of a total failure of the consideration. J. B. Scott, one of the justices of that court, testified that the matters directly in question before the marine court were the unseaworthiness of the vessel at the time of sale, and the knowledge of that fact by the plaintiff, it not being disclosed at the time of sale to the defendant.

The counsel for the defendant then insisted that the record was a judgment of a court of concurrent jurisdiction, upon the same matters in question in the court below, and was conclusive evidence in favor of the defendant to entitle him to a verdict. The judge decided, and charged the jury, that the matters given in evidence by the defendant were not, in themselves, sufficient to bar the plaintiff's action, but were entitled to the serious consideration of the jury, and were to be taken by them in conjunction with the other evidence of fraud offered in proof. The jury found a verdict for the plaintiff. The defendant excepted to the opinion.

It appears clearly that the question of fraud was tried between the parties in the marine court on one of the notes given in part payment of the vessel. The court had concurrent jurisdiction. The question is, whether the judgment thus obtained is not a conclusive bar to a recovery in this cause? The law is well settled that the judgment of a court of concurrent juris-

diction directly upon the point is, as a plea in bar, or evidence, conclusive between the same parties upon the same matter directly in question in another court. This was the rule laid down by De Grey, chief justice, in delivering judgment in the *Duchess of Kingston's case*, 11 State Tri. 261; 1 Phil. Ev. 223; 1 Pet. Rep. 202, Cir. Court U. S. I am not aware that it has been departed from by our courts. The general principle does not appear to be controverted by the counsel for the defendant in error; but it is urged that the judgment in the marine court does not affirm any particular fact in issue in this cause, but is general and indefinite; and that, from the language of the record, it can not be inferred whether the two cases were founded on the same or a different state of facts.

It is true, the record merely proves the pleadings, and that judgment was rendered for the defendant. Without other proof, it would not make out the defense. The record shows that it was competent, on the trial, to establish the fraud of the plaintiff. Whether fraud was made out, and whether that was the point upon which the decision was founded, must necessarily be proved by evidence extrinsic the record. To do so, it is not inconsistent with the record, nor does it impugn its verity. The jury must have passed on the fraud. It was directly in question. Scott testifies that the unseaworthiness was not disclosed at the time of the sale to the defendant. The inquiry, then, was solely directed to the question, was the vessel unseaworthy, and had the plaintiff knowledge of that fact when he sold? By the finding of the jury, both propositions are affirmed. The judgment became conclusive between these parties, on these points, and is an effectual bar to the action to recover the residue of the consideration-money. It is unnecessary to consider whether the record was admissible in evidence under the general issue, without notice. It was admitted, and no exception was taken on that ground. The effect ascribed to it seems to be the material question in the case. It is, in general, true that under non-assumpsit most matters in discharge of the action, which show that at the time of the commencement of the suit the plaintiff had no cause of action, may be taken advantage of: 1 Chit. 472. This rule may appear somewhat arbitrary, as the object of pleading is to apprise the adverse party of the grounds of defense. It is, however, peculiar to this action, although, as Chitty observes, not according with the logical precision which usually prevails in pleadings. The judge ought to have charged the jury that if, from the evidence,

they were satisfied that the matters in question had been passed upon in the marine court, the record was conclusive against the plaintiff's right to recover.

I am of opinion that the exceptions are well taken, and that the judgment ought to be reversed.

Judgment reversed.

ESTOPPEL BY JUDGMENT.—See *Betts v. Starr*, 13 Am. Dec. 94, and note; see, also, *Burt v. Sternburgh*, post.

BISSELL v. HOPKINS.

[3 COWEN, 186.]

RETENTION OF POSSESSION by a vendor or mortgagor of goods is *prima facie* though not conclusive evidence of fraud. It may be explained, by showing that the sale was *bona fide* for a valuable consideration, and that the vendor continued in possession in pursuance of some agreement consistent with an honest transaction.

ERROR to the common pleas, in an action of trover, brought by Hopkins against Bissell for a certain mare. The facts which were found by a special verdict are sufficiently stated in the opinion. Judgment for the plaintiff, to reverse which the defendant brought this writ of error.

Talcott, attorney-general, for the plaintiff in error, contended: 1. That the first bill of sale did not on its face show that the vendor was to retain possession of the mare, and that, therefore, it was in judgment of law fraudulent against creditors, citing, *Worseley v. De Matlos*, 1 Burr. 474, to show that fraud in such cases is sometimes a question of law. 2. That the bill of sale was not a mortgage, no time of payment being prescribed, but was in effect an everlasting pledge without delivery; that the vendor's continuance in possession was inconsistent with the deed, and, therefore, fraudulent, and that, with certain exceptions, the rule was the same in conditional as in absolute sales: 1 Pow. on Mort. 3, 4, 29; *Barrow v. Paxton*, 5 Johns. 258 [4 Am. Dec. 354]; *Clayborn v. Hill*, 1 Wash. 177 [1 Am. Dec. 452]; *Clow v. Woods*, 5 Serg. & R. 275 [9 Am. Dec. 346]; *Ryall v. Rolle*, 1 Atk. 165, 185; *Stevens v. Sole*, 1 Ves. 352; *Stone v. Grubham*, 2 Bulst. 226; *Manton v. Moore*, 7 T. R. 63; *Worsely v. De Matlos*, 1 Burr. 467; *Wilson v. Day*, 2 Id. 827; *Twyne's case*, 3 Co. 81, a; *Mace v. Cadell*, Cowp. 232. And that this case did not come within any of the exceptions noted in *Sturtevant v. Ballard*, 9 Johns. 337

[6 Am. Dec. 281]; or, in *Cole v. Davies*, 1 Ld. Raym. 724; or, *Guthrie v. Wood*, 1 Stark. 367; or, *Cadogan v. Kennet*, Cowp. 432.

3. That the object in taking the bill of sale in this case was not to secure payment, but to prevent other creditors from taking the property. 4. That if the plaintiff's claim was void against the defendant, the latter's knowledge of such claim was immaterial. 5. That the defendant in error, as landlord, might have distrained for rent due, and that he could not maintain trover for property seized off the premises. 6. That the defendant in error had no right of possession at the time of the taking and sale.

S. M. Hopkins, defendant, in *pro. per.*, contended: 1. That, while the general rule is that a sale of chattels unaccompanied by possession, is, by presumption of law, fraudulent *prima facie*, this rule is subject to exceptions in all cases where the vendor's possession is for a fair and lawful reason, and accompanies or follows the deed or bill of sale: *Cadogan v. Kennet*, Cowp. 432; *Stone v. Grubham*, 2 Bulst. 225; *Bucknal v. Royston*, Prec. in Ch. 285; *Cole v. Davies*, 1 Ld. Raym. 724; *Edwards v. Harben*, 2 T. R. 597, *per* Buller, J.; 1 Cranch, 309; *Craig v. Ward*, 9 Johns. 201; *Sturtevant v. Ballard*, Id. 337 [6 Am. Dec. 281]; *Benton v. Thornhill*, 7 Taun. 149, S. C., 2 Marsh, 427. 2. That the retention of possession was at most only a circumstance to go to the jury, upon the question of fraud, and might be explained: *Manton v. Moore*, 7 T. R. 68; *Kidd v. Rawlinson*, 2 Bos. & P. 59; *Worseley v. De Matlos*, 1 Burr. 484; *Ryall v. Rolle*, 1 Atk. 167; *Heselinton v. Gill*, 3 T. R. 620, n. (a). 3. That the doctrine is fully recognized in New York that, subject to a general presumption of legal fraud, sales of this sort may still be valid, where the intent is fair, and not calculated to do a wrong, etc.: *Sturtevant v. Ballard*, 9 Johns. 337 [6 Am. Dec. 281], *per* Kent, C. J.; *Barrow v. Paxton*, 5 Id. 258 [4 Am. Dec. 354]. 4. That a *bona fide* mortgage is universally allowed to be an exception: *Cortelyou v. Lansing*, 2 Cai. Cas. 202; *Barrow v. Paxton*, 5 Johns. 258 [4 Am. Dec. 354]. 5. That the first instrument was plainly a mortgage, because (1) it acknowledged a debt, (2) conveyed property to secure payment, (3) and provided for redemption. 6. That the second instrument was also a mortgage, being merely a continuation of the first. 7. That the transaction was perfectly fair, reasonable and open.

By Court, SAVAGE, C. J. The facts in this case are shortly these: In September, 1817, one Jesse Dyer rented of Hopkins a tavern-stand and small farm, at an annual rent of one hundred

and twenty dollars; which, however, was subsequently reduced. A book account had commenced between them in April preceding. Settlements were made at different times. At one of them, on the first of October, 1819, Dryer was found in arrears two hundred and seventy-four dollars and eighty-four and one half cents; and to provide for the payment and security of this sum, he executed a bill of sale of a variety of articles of personal property, including the mare now in controversy. It was agreed that the articles should be appraised by Jerome Curtiss; and upon payment being made, in the articles or otherwise, the surplus and remaining articles, if any, should be released. On the next day, the articles were appraised by Curtiss, at two hundred and thirty-seven dollars and seventy-five cents, and the appraisement indorsed on the bill of sale.

On the first of January, 1821, another settlement took place, at which a balance of one hundred and forty-six dollars and sixty-one cents was found due from Dryer, and another agreement was written on the same paper with the first, as follows: "1821, January 1. Settled the amount of the above to this time, and adjusted the balance at one hundred and forty-six dollars and sixty-one cents, for which so much of the above property as remains on hand is to remain liable. The mare above mentioned is to be delivered to Malcom McNaughton, on demand, but she is intended to remain in said Dryer's use for the present, and he is to pay into Elihu Scofield's hands, for said Hopkins in good judgments or securities, or to said McNaughton's hands, in grain, the amount of fifty dollars, within one month, and on continuing his payments in proportion, the mare is intended to remain with him." Dryer continued indebted to Hopkins, and at the time of the trial in the court below (May, 1821), was still indebted more than one hundred dollars. A large portion of his debt was for rent. More than one year's rent was due at the time of the sale.

In the month of November, 1817, an account commenced between Dryer and Bissell, and in March, 1820, a considerable balance being due, a suit was commenced against Dryer, and a judgment recovered in September, for ninety-one dollars and fifty-eight cents. Execution was issued on the fourth of January, 1821, and delivered to the sheriff, who was directed by Bissell to levy on the mare, while she was off the premises rented by Dryer of Hopkins. This was done, while the mare was in Dryer's possession, and in February she was sold at auction. Bissell became the purchaser. No rent was tendered or offered

to be paid, and Bissell had notice of Hopkins's claim on the mare before the sale.

The object of leaving the mare with Dryer was to enable him to settle and close his business as constable, he having no other horse. Applications were made to him for the purchase of the mare, to which he always answered she was not his, and that Hopkins had a claim on her, or owned her. Hopkins's claim was publicly known. There was no secrecy about the transaction. When the bill of sale was executed, Dryer was indebted to both plaintiff and defendant, and to others, but no judgment or execution, of consequence, was obtained against him, till after the assignment. The mare remained in Dryer's possession from the date of the first instrument, till seized by the sheriff. Part of the articles had been delivered, and credited on account.

The bill of sale of the first of October, 1819, was clearly a mortgage, payable on demand, and I can see no grounds for the imputation of fraud in fact, nor do I conceive the facts such as to constitute legal fraud. It is very distinguishable from *Twyne's case*, 3 Rep. 80. The property was received at a fair valuation. The donor continued in possession; but no person was deceived or defrauded. There was no secrecy, no concealment, no suit pending till several months afterwards.

I do not think it necessary to enter upon a minute review of the cases. Kent, C. J., has examined many of them in *Sturtevant v. Ballard*, 9 Johns. 338 [6 Am. Dec. 281], and comes to the conclusion that a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown to and approved of by the court, fraudulent and void as against creditors. The learned judge, no doubt, intended to say here, as in *Barrow v. Paxton*, 5 Johns. 261 [4 Am. Dec. 354], that possession continuing in the vendor is only *prima facie* evidence of fraud, and may be explained. The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors: *Cadogan v. Kennet*, Cowp. 435. The possession by the vendor, of personal chattels, after the sale, is not conclusive evidence of fraud. The vendee may, notwithstanding, upon proof that the sale was *bona fide* and for a valuable consideration, and that the possession of the vendor after such sale was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors. These points were directly resolved in *Brooks v. Powers*, 15 Mass. 244

[8 Am. Dec. 99]. It appeared in that case that one Witt, in the years 1816 and 1817, lived on a farm of the plaintiff, under distinct leases for each year, dated the first of April. On the fourteenth of April, 1817, a few days before the defendant's attachment issued, Witt gave the plaintiff a bill of sale of the oxen in controversy, and delivered them on the farm, in payment of the rent of part of the preceding year and the whole of the ensuing year. The plaintiff then agreed that Witt should have the oxen to carry on the farm, and they remained in his possession when the defendant caused them to be seized under his attachment. The court held the sale valid, and expressed themselves generally as to the effect of the vendor's continuing in possession in the manner I have already stated. *Benton v. Thornhill*, 7 Taun. 149, is a case somewhat similar.

The reason why the continuance of the vendor in possession will be accounted fraudulent is, that it gives him a false credit by which third persons are deceived. That reason fails in this instance. When the bill of sale was executed, Dryer was known to be indebted to several persons, but whether he was reputed to be insolvent does not appear. His landlord had an undoubted right to secure himself for his rent. Dryer had a right to prefer one creditor, provided it were fairly and honestly done. In this case the *bona fides* of the transaction are not questioned. A good reason is given, in my judgment, why the tenant was not at once stripped of his property, as thereby his power of acquiring the means to pay his debts would have been taken from him. No deception was practiced. The transaction was public. Dryer himself always, after the mortgage, stated the property of the mare to be in Hopkins. Bissell knew it before the sale, and probably before he prosecuted Dryer. In my opinion, the common pleas decided correctly, and their judgment should be affirmed.

Judgment affirmed.

RETENTION OF POSSESSION BY VENDOR OR MORTGAGOR.—On this subject see *Coburn v. Pickering*, 14 Am. Dec. 375, and the cases cited in the note thereto. The principal case has been frequently cited and approved in the New York courts as an authority on this point: *Seward v. Jackson*, 8 Cow. 453; *Jennings v. Carter*, 2 Wend. 449; *Diver v. McLaughlin*, Id. 600; *McLachlan v. Wright*, 3 Id. 349; *Archer v. Hubbell*, 4 Id. 518; *Hall v. Tuttle*, 8 Id. 391; *Collins v. Brush*, 9 Id. 200; *Doane v. Eddy*, 16 Id. 527; *Stoddard v. Butler*, 20 Id. 519; *Smith v. Acker*, 23 Id. 657; *Taylor v. Mills*, 2 Edw. Ch. 320; *Hanford v. Archer*, 4 Hill, 289; *Curtis v. Leavitt*, 15 N. Y. 120. But the doctrine here laid down seems to have been modified by the revised statutes: see *White v. Cole*, 24 Wend. 136.

ADKINS v. BREWER.

[3 COWEN, 206.]

JURISDICTION OF A CAUSE UPON ATTACHMENT in a justice's court depends upon its being made to appear that the defendant is concealed within the county with the intent mentioned in the act, or has departed, or is about to depart from the county with like intent.

LIABILITY OF JUSTICES OF THE PEACE.—A justice who acts without jurisdiction is liable as a trespasser. The rule is otherwise if he errs in the exercise of established jurisdiction.

ERROR to the common pleas, in an action brought by Adkins against the defendants for taking and carrying away the plaintiff's goods and chattels, in which the general issue was pleaded. It was proved at the trial that the goods were attached and sold under executions issued upon judgments recovered by the defendant Harvey against the plaintiff in four attachment suits brought before the defendant Brewer, a justice of the peace, and under certain other executions which were first satisfied. It appeared that at the time of beginning the attachment suits, one of the attachment bonds was partly or wholly filled up and executed, but that the others were signed, sealed and executed in blank, and delivered to the justice by the surety therein, with directions to fill them up. No evidence was offered that any proof was taken at the time of the issuance of the attachments of the absence or concealment of the defendant in said suits, and plaintiff in this action. The defendants moved for a nonsuit, which was granted, and the plaintiff in error excepted.

S. M. Hopkins, for the plaintiff in error, contended that the executions in favor of Harvey were void, because the justice had not acquired jurisdiction in the attachment suits, there having been no proof of the absence or concealment of the defendant therein, and no proper bonds having been executed, and that the defendants were therefore trespassers *ab initio*: 1 R. L. 398, sec. 23; *Vosburgh v. Welch*, 11 Johns. 175; *Curry v. Pringle*, Id. 444; *Percival v. Jones*, 2 Johns. Cas. 49; *Case v. Shepherd*, Id. 27; *Bigelow v. Stearns*, 19 Johns. 39 [10 Am. Dec. 189]; *Collins v. Ferris*, 14 Id. 246; *Cable v. Cooper*, 15 Id. 152; 1 Phil. 150.

I. Seelye, contra, contended: 1. That it would be presumed that the attachments were issued upon proper proof: *Van Dyck v. Van Buren*, 1 Cai. 84; *England v. Slade*, 4 T. R. 682; *Jackson v. Woolsey*, 11 Johns. 456; *Gray v. Garder*, 3 Mass. 399; *Colman v. Anderson*, 10 Id. 105; 1 Phil. Ev. 150, 151 (2d Am. ed.);

King v. Hawkins, 11 East, 216; *Powell v. Milbanke*, 2 Wils. 362; S. C., 2 W. Bl. 852; *Williams v. East India Co.*, 3 East, 192; *Monk v. Buller*, 1 Rolle, 83; *Dr. Harscot's case*, Comb. 202; Bull. N. P. 298; *Evans v. Birch*, 3 Campb. 10; Peak Ev. 5; *Hartwell v. Root*, 19 Johns. 345 [10 Am. Dec. 232]; 2. That trespass would not lie, because all the executions upon which the sale was made were regular, excepting three, and the good writs were a sufficient authority: *Crother v. Ramsbottom*, 7 T. R. 654; *Grenville v. College of Physicians*, 12 Mod. 386; *Hutchins v. Chambers*, 1 Burr. 579; *Lynne v. Moody*, 2 Str. 851; 3. That, at most, the want of proper bonds made the executions voidable only, and not void: *Buller v. Potter*, 17 Johns. 145; *Prigg v. Adams*, 2 Salk. 674; 4. That if the attachment issued on the oath of the party, or without oath merely, it was only error: *Steenburgh v. Korts*, 10 Johns. 167.

By Court, SAVAGE, C. J. The defendants are called on directly, not collaterally, to show why they have undertaken to dispose of the plaintiff's property. They must then show a lawful authority. A power to act is the first thing to be shown by a court of limited and special jurisdiction. To give the justice jurisdiction, it must appear that the person against whose property an attachment is sought is either concealed within the county, with the intent mentioned in the act, or has departed, or is about to depart the county, with the like intent.

In *Van Steenburgh v. Korts*, 10 Johns. 169, the court seemed to consider the proof of this necessary to confer jurisdiction; and Spencer, J., takes the distinction between proof before a court which is to give it jurisdiction, and before a court that already has jurisdiction.

In *Vosburgh v. Welch*, 11 Johns. 175, the court say, the justice must be considered as having issued the attachment without any proof whatever of the departure or concealment required by the act; and, of course, without authority. The rule as to the justice's liability is, that when he has no jurisdiction whatever, and undertakes to act, his acts are *coram non iudice*, and void, equally so as if he was not a justice. If he has jurisdiction, but errs in exercising it, then his acts are not void, but voidable only. In the former case he is personally liable; in the latter not: 17 Johns. 146; 2 Johns. Cas. 27; 14 Johns. 246; 19 Id. 89.

I do not consider this case as coming within the rule that an officer is presumed to have done an act, the omission of which

would render him liable for negligence. There is presumptive proof at least that no evidence was taken by the justice, and positive proof that no security was taken, except in one cause out of four. The sale by the constable, after the other executions were satisfied, could not be justified, except upon the authority of these executions, and as they were void, there was no authority whatever; all persons concerned were trespassers.

The judgment of the court below must be reversed.

Judgment reversed.

LIABILITY OF JUDICIAL OFFICERS.—On this point see *Grunon v. Raymond*, 6 Am. Dec. 200, and note; *Yates v. Lansing*, Id. 290, and note; *Little v. Moore*, 7 Id. 574; *Gregory v. Brown*, Id. 731; *Jones v. Hughes*, 9 Id. 364; *Tracy v. Williams*, 10 Id. 102; *Reid v. Hood*, Id. 582; *Flack v. Harrington*, 12 Id. 170.

ROWLEY v. BALL.

[3 COWEN, 208.]

LOST NEGOTIABLE NOTE.—No action at law can be maintained by the transferee on a lost negotiable note payable to bearer. The remedy is in equity. But if the note is not negotiable, or if negotiable, has never been negotiated, the payee can recover at law.

A NEGOTIABLE NOTE SHOWN TO HAVE BEEN DESTROYED will sustain an action at law.

ERROR to the common pleas. The action was brought originally in a justice's court by Rowley against Ball on a promissory note for thirty dollars, given by Ball to one William Huxley, alleged to be dated on or about the middle of June, 1819, payable to said Huxley, or bearer, and transferred to the plaintiff, which note was averred to have been stolen, lost, destroyed or taken from the plaintiff without his knowledge or consent. Plea, the general issue. The plaintiff had judgment before the justice, and Ball appealed to the common pleas. At the trial it appeared that Ball could not read or write; and that the note purported to have been signed by him by his mark, but had no subscribing witness. There was no direct proof of its execution, but it was proved by a brother of the payee, to whom the said note, together with another for twenty dollars, also against Ball, had been transferred, that he informed Ball that he held the notes, and requested payment of some money on them, and that Ball said he could not pay, but requested the witness to take a gun from him in part payment. It

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further appeared that the note in suit was subsequently transferred to the plaintiff and appellee, who testified that he put the note in his pocket-book, and some time afterwards made diligent search for it both in his pocket-book and desk, but could not find it; that it was either lost, stolen or destroyed; and that he had reason to believe that it had been stolen, and given to Ball, as the story of its loss first came to him from Ball. But on cross-examination, the plaintiff testified that his brother-in-law first suggested to him that the note was lost. It appeared that the note was overdue when lost. The defendant insisted that as there was no proof of the actual destruction of the note, he ought not to be put to his defense. The judges being of the same opinion, gave judgment of nonsuit, to which the plaintiff excepted, and brought the case here.

A. Samson, for the plaintiff in error, contended that an action at law was maintainable on a lost note, though negotiable, if lost when overdue, and cited: *Pintard v. Tuckington*, 10 Johns. 104; Chit. on Bills (Phil. ed.), 202; Marius on Bills, 19; Maxwell on Bills, 136; *Meeker v. Jackson*, 3 Yeates, 442; note to *Pierson v. Hutchinson*, 2 Campb. 214; *Freeman v. Boynton*, 7 Mass. 483, 486; *Brown v. Messiter*, 3 Mau. & Sel. 281; *Anderson v. Robson*, 2 Bay, 495; *Powel v. Roche*, 6 Esp. 76. In reply to the argument of the defendant's counsel that the proper remedy was in a court of equity, since a court of law could not exact indemnity, he was proceeding to discuss the question of indemnity, when Woodworth and Sutherland, JJ., informed him that it was not necessary to pursue that question as that defect was not insisted on in the court below, where the only objection made was that the actual destruction of the note was not proved.

J. Dickson, *contra*, insisted that no action would lie on a lost negotiable note, unless it was actually destroyed, citing *Pierson v. Hutchinson*, 2 Campb. 211; S. C., 6 Esp. 126; *Mayor v. Johnson*, 3 Campb. 324; Bayley on Bills, 169; Chit. on Bills (Phil. ed.), 484, 485; *Davis v. Dodd*, 4 Taun. 602; *Poole v. Smith*, Holt, N. P. 144; and that the proper remedy was in a court of equity, which alone could exact indemnity to secure the defendant against having to pay the debt twice, citing: *Walmsley v. Child*, 1 Ves. sen. 341; 1 Fonb. Eq. 17; *Ex parte Greenway*, 6 Ves. 812.

By Court, WOODWORTH, J. No exception was taken to the proof given as to the execution of the note. Were it necessary;

however, to express an opinion, I should consider the evidence *prima facie* sufficient. The witness stated to the defendant that he held two notes against him, given to William Huxley; one for thirty dollars, the other for twenty dollars. The defendant, in reply, admitted the notes, and offered to make part payment. The identity of the note to which the confession related is established with reasonable certainty. The case of *Shaver v. Ehle*, 16 Johns. 201, is clearly distinguishable from the present. The remaining question is, whether an action at law can be sustained on a negotiable promissory note, payable to bearer, by a person who was the holder, on his proving that the note was lost.

If the note had not been negotiable, or, if negotiable, had not in fact been negotiated, the plaintiff would be entitled to recover: *Pintard v. Tackington*, 10 Johns. 104. The cases which have not permitted a recovery at law upon negotiable paper lost, but not destroyed, were those in which the paper had been indorsed before it was lost: *Pierson v. Hutchinson*, 2 Campb. 211; *Ex parte Greenway*, 6 Ves. 812. In this case, the note being payable to bearer, the holder could make out *prima facie* a cause of action, and although the note was due at the time it was lost, the maker would be exposed to the hazard of showing that fact by legal evidence. It would, therefore, seem to be a hard doctrine which should place the maker in this situation, without requiring an indemnity. In such cases it is better to leave the party to his remedy in equity, where a suitable indemnity will be provided against any subsequent recovery. This subject peculiarly belongs to equity jurisdiction. In *Ex parte Greenway*, Lord Eldon observes: "I never could understand by what authority courts of law compelled parties to take the indemnity." In *Pierson v. Hutchinson*, Lord Ellenborough held, that whether an indemnity be sufficient or insufficient, is a question of which a court of law can not judge; and although there are dicta that, upon the offer of an indemnity, the endorsee of a lost bill may recover at law, they are so contrary to the principles upon which the judicial system rests, he could not venture to proceed upon them.

Chitty, in his *Treatise on Bills*, p. 173, ed. of 1817, is of opinion that where the bill has been lost after it became due, there is no reason why the person who lost it should not be permitted to proceed at law, without offering an indemnity, inasmuch as the law would, in such case, secure all the parties to the bill against future liability to a person who becomes the holder of it after it falls due. This is undoubtedly correct,

provided the maker of the note or acceptor of the bill could prove that it came to the hands of the holder after due. If, in the present case, the plaintiff recovers against the defendant, and subsequently a suit is commenced on the note by another, claiming to be a *bona fide* holder, the recovery had would not alone be a sufficient defense. The defendant must also prove the fact that it was due when it was lost by the present plaintiff. If he could not, then the subsequent holder would recover, on the ground that it did not appear he received the note after it became due.

It is not necessary that the plaintiff should have a remedy at law in such a case. His redress is ample in equity, where the defendant can be protected against subsequent liability. I have not found any adjudged case on this precise point; but, from the reason of the thing, and the analogy to cases where notes have been lost after they were indorsed, I think the action cannot be sustained, without proving that the note was destroyed.

Judgment affirmed.

REMEDIES ON LOST NOTES AND BONDS.—This subject is discussed in the notes to *Edwards v. McKee*, 13 Am. Dec. 479; and *Bank of United States v. Sill*, Id. 47.

MCKINSTRY v. DAVIS.

[3 COWEN, 339.]

A FEME-COVERT may be imprisoned on a *ca. sa.*, but not upon *mesne process*.

MOTION for the discharge of the wife of Davis, who was arrested at the plaintiff's instance, on a *ca. sa.*, issued upon a judgment in assumpsit against herself and husband, the husband not being liable to imprisonment, he having been discharged under the non-imprisonment act.

U. Miller, for the motion.

E. Williams, *contra*.

By COURT. Clearly this motion can not be granted. A *feme-covert* is liable to be imprisoned on a *ca. sa.*, with or without her husband; and so are all the cases, though it is otherwise as to *mesne process*.

Motion denied.

CASES
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS AND THE
CORRECTION OF ERRORS.
OF
NEW YORK.

SEYMOUR v. DELANCOY.

[3 COWEN, 445.]

SPECIFIC PERFORMANCE OF A CONTRACT is not decreed as a matter of course, but only in the exercise of a sound legal discretion. The complainant must present a contract which is fair, just and reasonable, entered into upon an adequate consideration, and free from fraud, misrepresentation or surprise, and not hard, unequal, or unconscionable.

DISCRETION WHICH THE CHANCELLOR POSSESSES in suits for specific performance of contracts is not arbitrary nor capricious; it must be regulated on grounds which will make it judicial.

INADEQUACY OF PRICE alone is not a sufficient ground to vacate a contract, but the enforcement of a contract may be refused where the consideration is so inadequate as to make the contract hard, unfair, and unreasonable. (*Per Savage, C. J.*)

SPECIFIC PERFORMANCE—TITLE OF VENDOR.—It is ordinarily sufficient that the vendor, seeking specific performance, is able to make title at the entry of the decree, though before then his title was imperfect.

THE HABITUAL INTemperance of one of the contracting parties may be a ground for denying a decree for specific performance, where it is sufficient to cast a suspicion on the fairness of the transaction.

INADEQUACY OF PRICE without fraud or other ingredient, is not sufficient to stay the power of chancery to enforce a contract for the sale of land, unless the inadequacy is so gross as to be evidence of fraud.

THAT THE VENDOR'S REMEDY at law is gone, by reason of there being a mortgage on the estate, so that he could not convey a good title at the day named in the contract, is no ground for refusing specific performance in equity.

APPEAL from a decree of the court of chancery dismissing the appellant's bill for a specific performance of certain articles of agreement. The case is sufficiently stated in the opinions of Savage, C. J., and Sudam, senator.

J. Duer and J. V. Henry, for the appellant.

Tulcott, Attorney-general, and S. Jones, for the respondents. The points and authorities presented on both sides sufficiently appear in the following opinions.

SAVAGE, C. J. On the fourteenth day of January, 1820 William Seymour and Thomas Ellison entered into an agreement, under seal, by which Ellison agreed to convey to Seymour farms in the towns of Montgomery and Walkill, in the county of Orange, containing, by estimation, seven hundred and ninety-nine acres of land; and Seymour agreed to convey to Ellison an equal undivided third part of certain lots in the village of Newburgh; the conveyances to be executed on or before the first of June then next. It was further agreed that the parties might respectively take possession of the premises so to be conveyed to them. The parties did take possession accordingly; and on the third of August, 1820, Ellison died without the conveyances being executed. The bill was filed against the respondents, as the heirs of Thomas Ellison, to compel the performance of the above contract. It was resisted in the court of chancery on three grounds: 1. Inadequacy of price; 2. Debility of Ellison's mind, produced by habitual intoxication; 3. The inability of the appellant to fulfill on his part.

The chancellor dismissed the bill on all these grounds, and expressed an opinion that inadequacy of price may, of itself, and without fraud or other ingredient, be sufficient to authorize the court to refuse its aid in enforcing the performance of a contract for the sale of land, though it might not be sufficient to set aside the contract.

These are the principal points in the case on which the defense rests. The testimony is very voluminous, and I shall not now enter into a detailed statement of it. The weight of evidence, in my judgment, establishes the difference in value between the farms and the lots, at five thousand dollars and upwards; and that Ellison was, in the month of January, 1820, and before and after, of intemperate habits. Some of the witnesses represented him as incapable of doing business; and others thought him capable, except when intoxicated. It also appears that, both in January and June, 1820, the village lots were encumbered by a mortgage to the amount of five thousand dollars, and so continued till shortly before filing the bill.

It is asserted by elementary writers that the power of enforce-

ing agreements specifically will not be exercised but to subserve the cause of justice; and that, whenever the bargain is a hard one, bordering on oppression; where there has not been perfect fairness; where any facts have been concealed which should have been disclosed; or where any unfair advantage has been taken; in those cases equity will not decree a specific performance, but leave the party to his remedy at law: Reeve's Dom. Rel. 386; Newland on Contr. 223, 224.

The cases in which a court of equity decrees specific performance of contracts, are those where damages recovered at law would not answer the intention of the parties in making the contract: 2 Sch. & Lef. 347.

In my judgment, his honor the chancellor is correct in saying that it is not a matter of course, in all cases, to decree specific performance of contracts: Cas. Temp. Talb. 236; 12 Ves. 331; 1 Ves. jun. 566. It requires the exercise of a sound discretion upon a view of all the circumstances. That discretion must, indeed, not be arbitrary and capricious. It must be regulated upon grounds that will make it judicial: 7 Ves. 35. If the contract has been entered into by a competent party, and is, in its nature and circumstances, unobjectionable, it is as much a matter of course to decree specific performance, as it is to give damages at law: 9 Ves. 603.

The appellant's counsel maintain that inadequacy of price alone is no ground for refusing to enforce a specific performance, unless it amounts to evidence of fraud. The case of *Thompson v. Harcourt*, 2 Br. P. C. 415, A. D. 1722, is claimed as an authority by both parties. As I understand it, it supports the proposition advanced by the appellant's counsel. The case was substantially this, so far as it is applicable here: During the infatuation which prevailed on the subject of the South Sea scheme, and on the eighteenth of June, 1720, Thompson agreed with Harcourt, that he would, on the next opening of the books of the company, transfer to him one thousand pounds South Sea stock, and Harcourt agreed to pay to Thompson nine thousand two hundred pounds for it, which is nine hundred and twenty per cent. The books were opened on the fifth of October. Thompson represented to Harcourt that he had the thousand pounds ready to transfer, though, in fact, he had but two hundred and ninety pounds. And Harcourt not being prepared to pay the nine thousand two hundred pounds, another agreement was entered into, by which the time was extended to the next transfer-day after Christmas, upon certain terms. That day

was the first of May, 1721, and Thompson not having the stock procured it of another, to be returned on certain conditions. On that day the stock was tendered to Harcourt, but refused by him, and then re-transferred to the person from whom it had been procured for the purpose of the tender. Thompson then prosecuted at law upon the contract; and Harcourt filed his bill to be relieved against it. In the meantime the bubble had burst, and it was enacted by parliament that all contracts for the sale and purchase of the stock unperformed on the twenty-ninth of September, 1721, where the seller had not the stock on the day of the contract, or within six days after, should be void as to so much as the seller was not possessed of. Thompson then filed a cross-bill, praying a specific performance. Both causes were heard at the same time, and the court decreed that Harcourt should pay Thompson nine hundred and twenty per cent. for the two hundred and ninety pounds stock which he actually held of his own. This decree was on the bill for relief; and the cross-bill, which was for specific performance, was dismissed without costs. Thompson appealed because he was not allowed the nine hundred and twenty per cent. on the whole thousand pounds; but the appeal was dismissed, and the decree affirmed. The only reason why the nine hundred and twenty per cent. was not allowed on the whole, must have been because he was the owner of stock to two hundred and ninety pounds only. The decree proceeded upon the act of parliament. So far as the court acted on the contract, they must be understood as decreeing a specific performance. In that case there was no pretense of fraud or circumvention. It seemed to rest on inadequacy only, and that arising from subsequent circumstances; the stock being worth nine hundred and twenty per cent. at the time of the contract. There were other facts and points in the case to which I have not referred, as they have no bearing on the present question.

In *Barnardiston v. Lingwood*, 2 Atk. 133, Barnardiston being distressed for money, conveyed to Lingwood his (B.'s) interest, being a remainder in-tail after the death of his uncle, worth three hundred pounds per annum, for the sum of three hundred pounds. A bill for relief was filed, and a cross-bill for a specific performance. Lord Hardwicke dismissed the cross-bill; and says that in the case of a hard bargain, when it is not absolutely executed, but executory only, the constant rule of the court is not to carry it into execution.

Buxton v. Lister, 3 Atk. 383, the bill was to enforce a contract

for timbers sold at three thousand and fifty pounds, when it was worth no more than two thousand five hundred pounds. Lord Hardwicke objected, at first, on the ground that the thing in controversy was a chattel; but finally decided on the merits, and dismissed the bill upon the ground of hardship without costs, on Buxton giving up the agreement; saying that if he was to dismiss it upon the misrepresentation (which was fully shown), he would dismiss it with costs. In the course of his remarks he uses the language quoted by his honor the chancellor: "That nothing is better established than that the court will not decree a performance of an agreement, unless it is fair and just in all its parts; and that it is in the discretion of the court whether they will decree a performance."

In the same year (1746), the cause of *Joynes v. Statham*, 2 Ath. 388, before him on a bill for a specific performance of an agreement for a lease of a house, which was signed by the defendant only, and contained a stipulation to pay nine pounds rent yearly. The defendant insisted and offered to prove that the agreement should have been to pay the rent clear of taxes; but the plaintiff, who wrote it, omitted that clause. Lord Hardwicke admitted the evidence, observing: "That the constant doctrine of this court is, that it is in their discretion whether in such a bill they would decree a specific performance, or leave the plaintiff to his remedy at law."

In *The City of London v. Nash*, 1 Ves. 12, more fully reported 3 Atk. 412, Lord Hardwicke refused to decree specific performance on the ground that the court is not obliged to do this where it will be attended with great loss and hardship to one of the parties. The bill, in that case, claimed a performance of an agreement to new build certain houses, which the defendant had agreed to do, but instead of building, had thoroughly repaired them. It is also observed that even if the defendant intended to evade his contract, still a specific performance would be hard, and all that the city wanted was to be compensated in damages. The chancellor, therefore, directed an issue.

In *Underwood v. Hitchcox*, 2 Ves. 279, Lord Hardwicke says: The rule of equity, in carrying agreements into a specific performance, is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration in strictness of law, it depending on the circumstances. And, undoubtedly, every agreement, of which there should be a specific performance, ought to be in writing, certain and fair in

all its parts, and for adequate consideration. And he refused, in that case, to decree performance, because it was too hard to decree the defendant to make a surrender of the copyhold estate (which was the thing in controversy), for so inadequate a consideration. He referred to the rule laid down in *Attorney-general v. Day*, 1 Ves. 220, where he says that decreeing performance is discretionary, when the party has his election of two remedies, in equity, or at law; and, even if there is no other remedy, it should not be done, if there are strong and material objections against it. Lord Hardwicke's rule was recognized by Lord Erskine, in *Mason v. Armilage*, 13 Ves. 37.

The case of *Faim v. Brown*, cited by counsel in *Ramsden v. Hyllon*, 2 Ves. 307, was admitted to be an authority supporting the chancellor's decree, if it was correctly stated. Lord Hardwicke, in that case, said that, independent of the circumstance of intoxication when the contract was entered into, the hardship alone of losing half the purchase-money, if carried into execution, was sufficient to determine the discretion of the court not to interfere, but leave the parties to law.

In *Day v. Newman*, at the rolls, 2 Cox, 77, performance was refused, on the ground of inadequacy alone; but in *Collier v. Brown*, 1 Cox, 428, decided the same year (1788), in the court of exchequer, though there was some inadequacy of price, a performance was decreed. An estate worth four hundred pounds, or more, was sold for two hundred and seventy-five pounds. The price first asked was three hundred pounds, but the owner was not much acquainted with the estate, and supposed she was selling to the tenant, till after the contract was executed. She was also very old; yet the court was of opinion that the parties bargained with their eyes open, and as there was no imposition or surprise in the case, mere inadequacy of price (when it could not be used as evidence of fraud), was not of itself sufficient to prevent the court from administering its usual equity.

Three years afterwards, the same court, in *Tilly v. Peers*, cited by Sir Samuel Romilly, from his own note, in *Mortlock v. Buller*, 10 Ves. 301, declared that laying out of consideration all circumstances of fraud, the court would not enforce a hard bargain. We have not the facts upon which the decision was founded; but it seems, from the remarks of Baron Thompson, that it was a clear case of fraud.

White v. Damon, 7 Ves. 30, was the case of property sold at auction for one thousand one hundred and twenty pounds worth

two thousand two hundred pounds. A bill was filed for a specific performance; and though Lord Rosslyn first dismissed the bill, on the ground of inadequacy, it was not finally decided on that ground. It was before Lord Rosslyn, and afterwards, on a petition for a rehearing, before Lord Eldon. They both, however, agreed in the general proposition that it is not a matter of course to carry an agreement into execution, but rests in discretion.

In *Coles v. Trecothick*, 9 Ves. 246, Lord Eldon declared that, unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive evidence of fraud in the transaction, it is not a sufficient ground for refusing a specific performance. He had just been recapitulating the facts. It was a case of sale of real estate by an auctioneer, and Trecothick had surveyed the premises, and valued them at twenty-three thousand pounds; had told the auctioneer not to sell for less than nineteen thousand five hundred pounds, and had agreed they should go for twenty thousand pounds; but he refused compliance with the contract, because another offer of twenty-five thousand pounds had been subsequently made; and if the declaration of his lordship was made in allusion to those facts, it certainly can not be questioned.

The case of *Mortlock v. Buller*, 10 Ves. 292, was also the case of a sale by an auctioneer, of an estate for twenty-six thousand five hundred pounds, worth thirty-four thousand nine hundred pounds. The question of inadequacy was noticed by the counsel and much discussed. Lord Eldon did not decide upon it, but refused the specific performance upon other grounds. He, however, seems to adopt the doctrine of Lord Alvanley, that the court is not bound to execute every contract; that if there was any sort of surprise that made it not fair nor honest to call for an execution, he would not give the extraordinary relief of a specific performance, neither would he order the contract to be delivered up, but would let the purchaser go to law.

So in *Willan v. Willan*, 16 Ves. 33, the point of inadequacy was not raised. Lord Eldon remarked that there are many cases where equity will not disturb an agreement which has been executed, though it would have refused to carry it into execution.

In *Western v. Russell*, 8 Ves. & Beames, 193, there was great inadequacy. The purchase was stated by counsel to be at one-tenth of the value. The master of the rolls does not, indeed, decide on that point; but he argues strongly against its suf-

ficiency, as a ground to refuse specific performance. There was in that case no pretense of incapacity. The vendor set his own price and obtained it, and though he lived a year and a half afterwards, expressed no dissatisfaction, yet, it was proved that in 1809, when the purchase was made, the estate was worth double the price. The master of the rolls, after noticing these facts, remarks that the court would treat men's contracts with great levity, if, on such a state of circumstances, it should refuse to carry them into execution. In *Griffith v. Spralley*, 2 Br. Ch. Cas. 179, n., it was decided, that inadequacy alone was not sufficient to set aside a transaction. Having thus noticed most of the cases cited by his honor, the chancellor, I shall proceed to state some of those cited by the counsel.

In *City of London v. Richmond*, 2 Vern. 423, the bill was filed to compel the performance of a lease. One objection was, that the rent reserved was seven hundred pounds per annum, and the real value not three hundred pounds, and that it was against the rules of equity to decree in specie such a hard and unreasonable bargain; but the Lord Keeper Wright said, as a beneficial bargain will be decreed in equity, so if it happens to be a losing bargain, for the same reason it ought to be decreed. *Adams v. Weare*, 1 Br. Ch. Cas. 567, on appeal from the rolls, was a bill for the specific performance of an agreement to purchase a mill-seat. The purchaser had agreed to give a large price, in the view of building a mill, which depended on the consent of the corporation of Bristol. The contract was absolute in its terms, and the vendor had refused to annex any condition. The vendee could not obtain the consent of the corporation, and refused compliance with his contract. The master of the rolls had decreed performance, and Lord Chancellor Thurlow said he thought he had done right, for no case could be cited where parties have made a bargain with their eyes perfectly open, and no surprise whatever, as in that case, in which the court had refused to decree specific performance. He added: "Here is no mistake of the object, and as to the greatness of the price, Adams (the vendor) had a right to ask a large sum, and the other had agreed to give it, with a view to the intended purpose of erecting and working his mill."

In *Mortimer v. Capper*, 1 Br. Ch. Cas. 156, the question was, whether equity would enforce the performance of an agreement, for a piece of land, against the heirs of the vendor, where part of the consideration was an annuity of fifty pounds, for the vendor's life, and he had died two days after making the agreement.

The whole consideration was two hundred pounds, and the annuity, fifty pounds. The ground was worth one thousand three hundred pounds; and it was contended that the agreement was too hard, and ought not to be carried into execution. The lord chancellor said: "I remember a case of a contract for a piece of ground, which was to be inclosed, for twenty pounds, and upon a bill for specific performance, the defense was, that it was worth two hundred pounds, and although the contract was to be performed *in futuro*, yet neither party knowing the value, the master of the rolls decreed performance." In relation to the case before him, however, he said: "I think if the price be fair, the contract ought not to be cut down merely because the annuity, which is a contingent payment, never became payable;" and he ordered a reference to a master, to inquire into the real value of the estate and of the annuity.

In *Emery v. Wase*, 8 Ves. 518, the question was, whether a husband should be compelled to procure his wife to execute his contract, and Lord Eldon, *arguendo*, says: "I do not deny that mere difference in value, though considerable, is not of itself a sufficient ground for refusing a specific performance of a contract; but very considerable difference in value is not inconsiderable evidence that it was not made with great care and attention."

In *Burrowes v. Lock*, 10 Ves. 470, Edward Cartwright was entitled to two hundred and eighty-eight pounds, and assigned it to the plaintiff, to whom he was indebted one hundred and thirty-two pounds, and by whom he was pressed for satisfaction of the debt. The costs of the transaction were ten pounds, paid by the plaintiff; and Cartwright had previously conveyed away one tenth, so that one hundred and forty-two pounds were given for what was worth two hundred and sixty pounds. The master of the rolls decreed performance, saying: "If fraud is out of the case, I do not know that I can set aside this contract, or refuse to act upon it, merely on the ground of inadequacy of price."

In *Cadman v. Horner*, 18 Ves. 10, the plaintiff prayed a specific performance of a contract, which was resisted on the ground of inadequacy and misrepresentation, and on those two grounds it was denied. But the master of the rolls expressed no opinion upon the question of inadequacy alone. The case of *Poole v. Shergold*, 2 Br. Ch. Cas. 118, decides that the difference arising from the calamities of the times ought not to rescind a contract; and *Jackson v. Lever*, 3 Br. Ch. Cas. 605, that a contract for the sale of land, for an annuity for the life of the vendor,

shall be performed by the vendor's heirs, though he died without receiving any part of it.

The object of the two last cases, I presume, was to show that although the navy yard was not established at Newburgh, and although Ellison died before the application to enforce the contract, yet neither of these circumstances can constitute a defense to the present action. Many cases have also been cited by the counsel for the respondents, some of which I shall examine. I will first, however, consider a little further some of the above cases.

The case of *Thompson v. Harcourt*, I have considered an authority for the appellant. As I before remarked, it was claimed by the counsel on both sides. It was considered by the chancellor as a case in favor of the respondents. Perhaps, therefore, I am mistaken in my reading of it, but I think not. It was in the house of lords. The reporter has not given the opinion of the judges, and we must infer the ground of decision from the case, the decree, and the points argued by the counsel. The case was decided thirteenth of February, 1722. On the ninth of November, in the same year, the case of *Kien v. Stukely* was decided (which I shall hereafter refer to on another point), in which a specific performance was refused. Both these cases grew out of the South Sea speculation, or were connected with it. In the first, where nine hundred and twenty per cent. was decreed to be paid, it appeared that when the contract was made, it was fair and equal; that stock, at one time was one thousand per cent. above par. The inadequacy arose, therefore, from subsequent circumstances, and did not exist at the time of the contract. In the latter case, lands were sold for forty years' purchase, which at the time were worth only fifteen years' purchase; and the vendee expected to pay in South Sea stock. The inadequacy here existed at the time of the contract, and must have been one ground, at least, of the decree. Both cases were decided by the same court, and within nine months of each other; and in my opinion are perfectly reconcilable upon the relative difference of time at which the inadequacy arose. So in *London v. Richmond*, the rent was agreed upon on a calculation of the quantity of water which certain pipes would discharge. This was greatly overrated; yet the court compelled performance. The lessee should have calculated better; though, I confess, I am not satisfied with that case.

In *Adams v. Weare*, the seller was explicit, and when the purchaser said he would give the price, if the consent of the city of

Bristol could be obtained, the seller told him: "Sir, I will have no 'if' in the case. You must purchase absolutely, or not at all." In that case it was admitted that the inadequacy existed at the time of the contract, and was known to both parties; and the court would not permit the purchaser afterwards to be off from his contract, because he did not succeed in his speculation.

Not so in this case. The appellant avers that the lots were worth the consideration given, or very near it, long before anything was ever said about a navy yard at Newburgh; and on the other hand, the inadequacy is shown to have existed at the time of the contract, and not to have arisen from subsequent circumstances. It does not appear that the expectation of a navy yard was the sole inducement to the purchase. It is stated by one witness, that Ellison intended to build stores and sloops, and go extensively into commerce.

Johnson, Ex'r of Hill, v. Nott, 1 Vern. 271, 272. In this case, Hill bought of the defendant a contingent estate at an under-value. Nott had previously brought his bill to be relieved, and was relieved by Lord Nottingham; but, upon a rehearing before Lord Keeper Guilford, that decree was reversed. Johnson then brought his bill for a specific performance; and the lord keeper said that a contract which carries an equity to have it decreed in specie, ought to be without all objection.

In *Vaughan v. Thomas*, 1 Br. Ch. Cas. 556, the plaintiff agreed with the defendant for an annuity worth nine years' purchase, for the consideration of five years' purchase, and brought his bill to compel a specific performance; but the court said that if they assisted the plaintiff, they should give sanction to a very unconscientious bargain, and that, under this view of the case, he was by no means entitled to their aid.

In *Collett v. Wollaston*, 3 Br. Ch. Cas. 228, the plaintiff had purchased, at auction, the reversionary interest of two thousand pounds South Sea stock, subject to the life of a man forty-five years of age, and one thousand two hundred pounds South Sea annuities, for two hundred and fifteen pounds; and filed his bill for an assignment and transfer. The master of the rolls said, the reversionary interest seeming to be sold for a very low price, he would direct an inquiry into their value before he decreed a specific performance of the purchase: *Vid.*, also, several cases, 5 Vin. 539 to 549, adhering to the rule in *Manby v. Beckley*, that the contract must be fair and reasonable in every particular.

In *Clitherall v. Ogilvie*, 1 Desau. 257-263, the defendant

entered into a written contract to sell the plaintiff certain lands, for three thousand five hundred pounds, which were worth three times that amount. On further inquiry as to the value of the property, he declined executing the conveyances; and the bill was brought for a specific performance. The court, after a full discussion and examination of the cases on the subject, took notice of the distinction between setting aside an unreasonable contract after it is executed and compelling a specific performance; and recognizing Lord Hardwicke's rule in *Underwood v. Hitchcox*, declared, that on full consideration of the case, and all the circumstances (although there was no proof of fraud or imposition), the sum for which the land was agreed to be sold was grossly inadequate to its real value; and that being an unreasonable contract, and a very hard bargain, it would be unreasonable and unjustifiable to decree a specific performance, and left the plaintiff to his remedy at law.

In *Ward v. Webber*, 1 Wash. 279, President Pendleton, delivering the opinion of the court, says: "It is true that the court will never decree iniquity, and there are instances where they have refused to decree hard bargains, though fair; but these are rare, and are generally cases of glaring hardships. For, in general, the court will not undertake to estimate the speculations of parties in a contract, but will deem them the best judges of their own views, and will compel a performance, though they may be eventually disappointed in their expectations."

In the case of *Campbell v. Spencer*, 2 Binn. 138, there was no fraud or imposition, nor does it appear that there was inadequacy to any great degree; but it was a foolish bargain, whereby a farmer agreed to sell his farm for the remnant of a store of goods; and Chief Justice Tilghman and Judge Breckenridge both say they would not enforce the contract nor declare it void, but leave the plaintiff to his action upon it. Judge Breckenridge placed reliance upon its being a hard bargain, attended with suspicious circumstances.

In the case of *Osgood v. Franklin*, 2 Johns. Ch. 23 [7 Am. Dec. 573], the chancellor remarks: "There is a very important distinction, which runs through the cases, between ordering a contract to be rescinded, and decreeing a specific performance. Though inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded, unless its grossness amount to fraud, yet it may be sufficient for the court to refuse to enforce performance. It is not uncommon for the

court to refuse to enforce for inadequacy, and at the same time to refuse to rescind."

Chancellor Desaussure, who was not on the bench when the cause of *Clitherall v. Ogilvie*, was decided, has added a valuable and learned note to the report of that case, which he concludes by observing: "It is agreed, on all hands, that the court is not bound to decree a specific performance in every case where it will not set aside the contract, nor bound to set aside every contract of which it will not decree the specific performance. The court will not decree specific performance where there is any surprise, making it not fair and honest to proceed and call for specific performance."

Having thus taken a cursory view of some of the principal cases on the point under consideration, and having also noticed the *dicta* of some learned jurists, I shall be justified in the remark that the question is one upon which very great men have differed, and have administered the equity of the court upon diametrically opposite principles. The one class maintain that the court will not lend its aid to enforce the performance of contracts unless they are fair, just and reasonable, and founded on adequate consideration. The other class maintain that unless the inadequacy of price is such as shocks the conscience and amounts in itself to decisive and conclusive evidence of fraud in the transaction, it is not of itself a sufficient ground for refusing a specific performance.

The most distinguished of those who support the latter doctrine is Lord Eldon. To him may be added Sir William Grant Lord Keeper Wright, and probably some others. The former doctrine was declared or acted upon by the Lords Somers, Maclesfield, Northington, Guilford, Talbot, Harcourt, Hardwicke, Alvanley, Erskine, Rosslyn, and Chief Baron Eyre, in England, and in this country it has been adopted by the court of chancery of South Carolina, the court of appeals of Virginia, and the court of chancery of this state; and I believe there is no American decision to the contrary. Among American jurists of distinguished celebrity, who have maintained this doctrine, are Chancellor Desaussure of South Carolina, President Pendleton of Virginia, the late Chief Justice Reeve of Connecticut, and last though not least, the late Chancellor Kent, *justum et tenacem propositi virum*, a man whose stern integrity, superior talents, and extensive erudition, have rendered him an ornament to the courts over which he has presided in his native state; and who may, without arrogance, but with the most perfect complacency, look

back upon his twenty-six years of judicial labors, and say: *Exegi monumentum aere perennius; regalique situ pyramidum altius: non omnis moriar; nullaue pars mei vitabil Libitinam.*

If we determine this question by the prevailing practice of courts of equity (it has not, indeed, been uniform), we must decide in favor of the rule as laid down by Lord Hardwicke. If we determine it by the reason and propriety of the two propositions, there is certainly great weight in the consideration that, in enforcing contracts, the court, if it acts at all, must act *ex rigore*, and can not weigh the equities of the parties, whereas a jury, in a court of law, can mitigate the damages according to equity and good conscience. It seems, indeed, paradoxical to send parties from a court of equity to a court of law to obtain equity; but it arises from the peculiar construction and practice of the courts.

Again, if we call to our aid the opinions of men among the most celebrated for their learning and talents of the times in which they respectively lived, we find a great preponderance in favor of sending hard and inequitable bargains to a court of law. Upon authority, therefore, as well as upon principle, I am clearly of opinion that a court of equity ought not to lend its aid in enforcing an executory contract, unless it is fair, just, reasonable and equal in all its parts, and founded upon adequate consideration. It is undoubtedly well settled that inadequacy of price alone is not a sufficient reason for setting aside a contract executed, unless its grossness amount to fraud; but there is a wide difference between enforcing an executory contract and setting aside a contract deliberately executed; and the two subjects admit of very different views and considerations.

The next ground of defense is, that Ellison's mind was debilitated by habitual intoxication. The witnesses agree as to the fact of his habitual intemperance for some years before his death; but they differ in their opinions as to the effect produced by it upon his capacity to transact business. The fact is before the court, and our acquaintance with mankind supersedes the necessity of evidence to prove that habitual inebriety, in most cases, debilitates the mind. As like causes produce like effects, it would require strong proof to show that Ellison was an exception to the general rule. It also appears that this contract was unknown to his family and friends. It was made by Drake Seymour on behalf of his brother. And though the character of Drake Seymour rebuts the idea of fraud or imposi-

tion upon a man under intoxication; yet it is well known that interest has a controlling influence over the minds of many, perhaps of most men, even of correct principles; and may, and often does, induce them to make bargains which conscience can not approve.

The third ground of defense is that the appellant was unable, on the day appointed, to give a title to the lots, on account of incumbrances. The appellant's counsel contend that it is sufficient if he was able to give a title at the time of the decree; and so it was decided by the master of the rolls, in *Langford v. Pitt*, 2 P. Wms. 630. He said that the direction of the court, in all cases, was to inquire whether the seller can, not whether he could, make a title at the time of executing the agreement. In *Wynn v. Morgan*, 7 Ves. 202, it was decided that where the time at which the contract was to be executed, is not material, and there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed, but being able to make a title at the hearing, is entitled to a specific performance.

In *Brashier v. Gratz*, 6 Wheat. 528, Chief Justice Marshall says, the rule that time is not of the essence of a contract, has been recognized in courts of equity; that a failure to perform on the day does not deprive a purchaser of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his part of the engagement. But the rule is not universal. Circumstances may have changed, and the other party may be placed in a worse condition; and then the court would leave the parties to their remedy at law. The party who is ready, may file his bill requiring the other to perform or rescind; and the court will compel him to do one or the other. If, then, a bill for a specific performance be brought by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances.

In *Hepburn v. Auld*, 5 Cranch, 262, the same point had been so ruled, though Mr. Justice Livingston expressed his dissent on the point of dispensing with time: 1 Wheat. 195, 196, S. C. In *Buller v. O'Hear*, 1 Desau. 398 [1 Am. Dec. 671], the court say: Lapse of time, unattended with other circumstances, is not, of itself, a sufficient ground for it to refuse its aid to compel a specific performance of an agreement; that it was sufficient if the plaintiff could then make title. In *Judson v. Wass*, 11 Johns. 525 [6 Am. Dec. 392], which was a case of the sale of

land, at auction, one of the conditions being that the money should be paid in seventy-five hours, the conveyance to be dated on the day of sale; the premises were incumbered with a mortgage, and the court said that in every sale of that kind, there is a condition, that the purchaser shall not be bound to part with his money, unless the seller is able to give him a title according to the terms of the sale. That, however, was an action at law, and is not applicable here. In *Waters v. Travis*, 9 Johns. 466, the late Chief Justice Spencer, who gave the opinion of this court, says, the lapse of time, when no material inconvenience has been suffered, can be urged only on the ground that it is evidence of abandonment of the agreement.

In the case now under consideration, I am inclined to the opinion that the appellant not being in a condition to give a good title on the first of June, 1820, is, of itself, no objection to a specific performance. The conveyances were to be simultaneous acts, or rather by the terms of the contract, Ellison was first to convey. The language of Seymour's covenant is: "In consideration of which premises (the conveyance by Ellison) the said William Seymour doth by these presents covenant and agree," etc.

But it seems that when there is great inadequacy of consideration, the vendor is held to great strictness, as to time in the performance on his part. In the case of *Kien v. Stukely*, 2 Bro. P. C. 396, 398, Stukely, on the twentieth of July, 1720, sold lands by contract to Kien for forty years' purchase, when they were worth only fifteen years' purchase, and one hundred and twenty pounds were paid; Kien intended to pay the residue in South Sea stock, which was then worth one thousand per cent., and the title was to be made out on the twenty-ninth of December, then next. The title was not made out by the day, and Kien declined the purchase. On a bill filed by Stukely, performance was decreed, but on appeal to the house of lords, this decree was reversed. By the report in Brown, the decree seems to rest on the ground of inadequacy; and the point relating to time is not stated; but from a report of the same case by Baron Gilbert, Gilb. Rep. 155, 156, it seems to have been decided on the ground of the vendor not having made out his title to the premises sold by the day stipulated in the contract. The decision is understood by Sudgen in his *Treatise on Vendors*, p. 281, as having been made upon both grounds, and he has deduced from it this principle: that when the price is unreasonable or inadequate, or the contract is in other respects inequitable,

equity will not assist either party, if he has permitted the day appointed for completing the contract to elapse without performing his part of the agreement.

On the whole case, therefore, I am of opinion: 1. That on the question of decreeing specific performance of executory contracts, the court of chancery must exercise its discretion, not an arbitrary, but a sound, judicial discretion. If the contract be free from objection, it is the duty of the court to decree performance; but if there are circumstances of unfairness, though not amounting to fraud or oppression, or if the inadequacy of consideration be so great as to render the bargain hard and unconscionable, on either ground, the court may refuse its aid to enforce the contract, and leave the parties to contest their rights in a court of law. If it is asked what degree of inadequacy is necessary to constitute the bargain a hard one, it might be asked in answer, what degree of inadequacy is necessary to constitute fraud, to shock the conscience and produce an exclamation? The truth is, that neither the one nor the other admits of a definite answer. It must be determined by the judgment of the court, and as there is certainly a difficulty in ascertaining the precise point, there is much less danger in stopping short of it, than in going beyond it. To me it seems a solecism in language to say, that a party who has obtained an inequitable bargain, shall be received in a court of equity to demand its performance.

2. In the next place, though the incompetency of Ellison arising from habitual intemperance is not clearly established, yet enough appears to raise a doubt on the subject, and to cast a suspicion upon the fairness of the transaction. The authorities cited on the question of setting aside contracts obtained from persons while under the influence of intoxication are not applicable. None of them state that a contract so obtained ought to be enforced in equity, by decreeing a specific execution.

3. And, although, lapse of time when not of the essence of the contract, or an incapacity to make title on the day stipulated, are not insuperable obstacles in the way of obtaining the specific execution of a contract, provided title can be made before the decree; yet, when connected with inadequacy of price, they will justify the court in withholding the exercise of its extraordinary powers in compelling a specific performance.

I concur, therefore, with his honor the chancellor, and am of opinion that his decree should be affirmed.

WOODWORTH, J., not having heard the argument, gave no opinion.

CLARK, EARLL, GARDINER, GREEN, MALLORY, McCALL, MORGAN, WARD, and WRIGHT, Senators, concurred in the opinion of the chief justice.

SUDAM, Senator. In this case, it cannot be necessary for me to enter into a detailed statement of the facts. I shall merely take a general view of the claims of the appellant, and of the defense set up by the respondents, and then proceed to the consideration of the question submitted to the court by the counsel who have so ably and ingeniously argued this case.

William Seymour, the appellant, and Thomas Ellison, the father of the respondents, on the fourteenth of January, 1820, entered into an agreement for the exchange of one third of certain lots owned by Seymour, in the village of Newburgh, for certain farms owned by Ellison, in Montgomery and Walkill. The property is particularly described in the article between them. By this agreement, Ellison covenanted with Seymour that he would on or before the first day of June next ensuing its date, by sufficient conveyances, grant, bargain and sell, etc., the farms to the appellant in fee-simple; in consideration of which Seymour covenanted and agreed that he would, on or before the first day of June ensuing the date, sufficiently grant, bargain and sell to Ellison the equal undivided third part of the Newburgh lots, with the wharves, buildings, etc. The articles of agreement contain the following clause: "And it is hereby further agreed by and between the said parties, that it shall be lawful for them respectively to enter into and upon the said premises to them respectively intended to be granted and conveyed, and to have and receive the profits thereof to their own use respectively."

The bill states that in pursuance of this agreement, Seymour entered into possession of, and received the rents and profits of the property to be conveyed to him by Ellison, and Ellison entered into the possession of the property to be conveyed to him by Seymour; and that Ellison's heirs at law have, since his death, continued in possession; that Seymour, during the lifetime of Ellison, was always ready to convey to him, according to his contract, but that Ellison, for several months previous to his death, was incapable of transacting business; and that he died about the third of August, 1820, intestate, leaving Harriet Ellison, his widow, and the respondents his heirs at law; that

all his children, except Mary Jane Delancy, are infants, under the age of twenty-one years; and that by reason of their infancy they cannot convey according to the terms of the contract; that Mrs. Ellison, the widow of Thomas Ellison, died before the time of filing the bill.

The prayer of the appellant is, that the respondents may be decreed to execute a deed, according to the true intent and meaning of the covenant entered into between the appellant and Thomas Ellison in his life-time.

The respondents admit: 1. That their father, Thomas Ellison, entered into the covenant with Seymour, the appellant; but they leave him to prove whether he had a sufficient title to the property to be conveyed by him; 2. They insist that he had previously conveyed a portion of it to his sister, Esther Seymour, or to some other person for her use or benefit; 3. That his title was very questionable; 4. That the bargain for the exchange was unconscionable, inasmuch as the lands to be conveyed by Ellison to Seymour exceeded the value of the lands to be conveyed by Seymour to Ellison by several thousand dollars; 5. That the appellant could not make a good title to the premises because they were incumbered by a mortgage remaining uncanceled at the death of Ellison; 6. That the appellant did not, on or before, or subsequent to the day specified, tender a deed, in pursuance of the article; 7. That Ellison, from the fourteenth of January, 1820, until the first of June, 1820, "was in all respects as capable and competent to transact business as he was for several weeks and months, previous to the fourteenth of January, 1820." Then the respondents, after stating their age, and denying that the appellant was ready and willing to execute and deliver a deed to Ellison in his life-time, and leaving him to his proof, submit themselves to the decree of the court.

In the decree entered in this cause by his honor, the chancellor, he refuses to direct a specific performance of the contract by the heirs at law of Ellison, "from the great inadequacy in value of the lots in the village of Newburgh, which Seymour contracted to convey to Ellison, for the two farms in Orange county, which Ellison contracted to convey to Seymour, as mentioned in the pleadings and proofs, and also from the habits of intoxication, in which Ellison had indulged in the last years of his life, and the mental debility produced thereby, and, also, from the want of readiness and ability in Seymour to convey a good and unincumbered title to the said lots in the village of

Newburgh, at the time fixed for the performance of said contract, or at any time thereafter during the life-time of Ellison."

The respondents, in support of this decree, make the following points: 1. That the bargain was hard, disproportionate and unequal in its terms; 2. That during the time of the negotiation, and at the time Ellison entered into the contract, he was not in a fit state of mind to form such an agreement, or to understand his rights or appreciate his interests, and that the bargain was secretly and unfairly obtained by the appellant; 3. That the appellant did not, and could not perform the agreement on his part, as stipulated by him, in the life-time of Ellison, because the appellant's lands were incumbered to their value, and there was no waiver of time or indulgence given by Ellison in his life-time, nor by the respondent since his decease.

The first point made by the respondents, that this contract for exchange of lands was hard, disproportionate and unequal in its terms, is the main point in the cause, and has been so treated by the chancellor in his opinion. He assumes it as a fact, that, "at the date of the agreement, the village lots were not worth half the value of the country farms." And says: "We may make an ample advance of the one, and an ample diminution of the other in value, if we were to fix the one third of the Newburgh lots at six thousand dollars, and the farms at twelve thousand dollars."

The decision upon the evidence given as to the difference in value between the property to be conveyed by the appellant to the father of the respondents, may decide the cause without entering into the consideration of the other points; but I think our decision must depend mainly on other evidence, for it can not be sustained, in my opinion, that mere inequality in value, which is not so gross as to strike the moral feeling of an indifferent man, would be sufficient to warrant the chancellor in withholding a decree for specific performance. I admit that the exercise of the power in a court of chancery, to enforce the specific performance of contracts for the sale or the exchange of land, rests in the sound discretion of the court; but this is a sound legal discretion, and not the exercise of an arbitrary power, interfering with the contracts of individuals, and sporting with their vested rights. I also admit, that the party claiming the specific performance must present a case fair, just and reasonable; that the contract must be founded on adequate consideration, and that it must be free from fraud, misrepresentation, deceit or surprise.

To determine whether, in fact, the agreement for exchange was hard, unequal and disproportionate, and whether it was free from fraud, surprise, etc., it will be necessary to examine with as much brevity as possible, the history of this transaction.

On the third of January, 1818, Drake Seymour, the brother of the appellant, sold to Ellison, the father of the respondents, the one equal undivided third part of the lot first described in the articles of agreement, lying on the east side of Water street, for the sum of twelve thousand five hundred dollars, cash. This bargain was made verbally in the year 1817, and completed by the delivery of the deed in January, 1818; and the negotiation concerning it was kept up from April, 1817, to January, 1818, when it was consummated. In March, 1818, Ellison agreed to purchase of Samuel Sands Seymour his undivided third part in the same lots, lying east and west of Water street, for thirteen thousand eight hundred and twenty-five dollars, he taking in part payment a mortgage which Ellison held against one Tallman, and Ellison agreeing to guaranty that, on foreclosure, the mortgaged premises should produce the principal and interest due. This contract was signed and sealed by the parties.

In March, 1818, Ellison informed Drake Seymour, "that he had only to purchase the part of the lot belonging to the appellant to own the whole;" and made propositions to the witness, Drake Seymour, to be submitted to his brother. Both in the years 1818, and 1819, Drake Seymour frequently saw Ellison in relation to the purchase of the appellant's one third of the lots; and from the time Ellison first proposed to purchase from the appellant, to the time when a verbal contract was concluded for the exchange, more than eighteen months had elapsed; and about one year and ten months had elapsed before it was reduced to writing and signed by Ellison and the appellant. On the conclusion of the verbal agreement Ellison authorized the appellant to take possession of the farms; and possession was taken accordingly. In January, 1820, the appellant sent, by Drake Seymour, to Ellison, at New York, the articles of agreement in question, already executed on his part. They were handed to Ellison to be executed by him. He requested that they might be left with him for examination to see if they were in conformity with the verbal agreement. He examined them, found them correct, and executed them the day after.

By the evidence of Samuel McCoun, who was employed by Ellison to estimate the value of the farms, it distinctly appears

that he understood from Ellison that he and the appellant were negotiating for the exchange. In various conversations he told McCoun, "that he was negotiating an exchange with the appellant, and that he wished McCoun to make up his mind upon the value of the two farms to be exchanged for the Newburgh lots. That he, Ellison, did not wish McCoun to appraise the appellant's lots in the village of Newburgh; but that he would do that himself." It is also in evidence that Ellison during the summer resided in New Windsor, in the county of Orange, adjoining the village of Newburgh, and that he was well acquainted with the property of the appellant proposed to be exchanged for his two farms. It also appears that Ellison had a favorable opinion of Newburgh as a business place; and he may have been influenced by the consideration that property there would rise in value, in consequence of the expected establishment of a navy yard.

That the contract was deliberately made, there can be no doubt. McCoun says expressly that Ellison told him "he would not conclude the bargain between him and the appellant until he had seen him" (McCoun), and ascertained his opinion of the value of the farms. We here find a purchase by Ellison in January, 1818, of one third of the Newburgh lots, east of Water street, for the sum of twelve thousand five hundred dollars, on a negotiation commenced in April preceding, and at a time when, according to the pleadings and proofs, there is no pretense of incompetency. About March, 1818, Ellison purchased from S. S. Seymour his undivided third in the Newburgh lots, lying east and west of Water street, for the sum of thirteen thousand eight hundred and twenty-five dollars. About the same time, he informed Drake Seymour that he had purchased one third of S. S. Seymour, and talked of exchanging farms for the like share of the appellant. In addition he informed Benjamin Case and John Anderson that he had purchased the shares of Drake and S. S. Seymour, and that he also intended to purchase the share of the appellant; and he told Anderson how he intended to render the property valuable to himself. The whole presents a very strong case, and one in which the contract should be carried into effect, unless some controlling rule of decision in our equity courts shall require the contrary.

There can be no doubt, from a review of the evidence, that Ellison made his bargain well knowing all the facts in relation to the Newburgh lots, as well as his farms proposed to be ex-

changed for them. His own agent (McCoun), ascertained the value of the farms. He said he would himself appraise the value of the lots in Newburgh. It could not be pretended that after a purchase of two thirds of the whole property, he had never examined the premises, or that he had not ascertained the situation and comparative value of the Newburgh lots; for it is admitted by all parties that at the time of the purchase from Drake Seymour, and his agreeing to purchase of S. S. Seymour, he was not incompetent to transact business of any kind. Immediately after this, the negotiation for the one third of the appellant's lots commenced, and the negotiation continued for eighteen months before it was verbally concluded; and for one year and ten months before it was reduced to writing. There is, therefore, no pretense, in my opinion, that Ellison was not fully acquainted with the premises proposed to be exchanged with him by the appellant. Besides, having before become the purchaser of two thirds of the lot on the east side of Water street, and the one third of the lot of S. S. Seymour on the west side of the same street, and having paid in each instance a sum exceeding the price he had agreed to pay the appellant, we have the positive testimony of Drake Seymour that throughout the whole of the negotiation he was perfectly competent to transact business. He was in a situation deliberately to form his opinion, and unquestionably he did so, as to the value of the Newburgh lots; and from his previous purchases, he must have ascertained their value to his own satisfaction. Under the advice of his agent, he knew the value of the property to be conveyed by him to the appellant. We must take it then that Ellison deliberately, and with his eyes open, entered into the contract, which the appellant now seeks to enforce by a decree of a court of equity.

I am, therefore, of opinion, from a review of the whole evidence that this contract was, at the time the negotiation was first entered into, and at the time the articles were executed by Seymour and Ellison, certain, fair and just, in all its parts.

The next question which presents itself to the consideration of the court is, whether the contract between the appellant and Ellison is so hard, unreasonable, or unequal, that this court will not aid to enforce it. In reviewing this part of the case, it will be the duty of the court to investigate the evidence as to the value of the Newburgh lots, and the farms to be exchanged for them. Should they arrive at the conclusion that mere inadequacy, in value, where there is no fraud, misrepresentation, im-

position, or concealment of facts, is of itself sufficient to avoid the contract, it will save a great deal of labor and investigation, which might otherwise be required. I admit, however, that where the inadequacy of price in a contract is so flagrant and palpable as to convince a man at the first blush, that one of the contracting parties had been imposed on by some false pretense, such a contract ought not to be enforced by this, or any other court of equity. It is not to be denied, that it is the settled doctrine of the court of chancery, that it will not carry into effect, specifically, a contract where the inadequacy of price amounts to conclusive evidence of fraud. In this view of the case, therefore, as well as in reference to the objection of mere inadequacy, I shall briefly examine the evidence of value.

It may be proper to premise, that there is a distinction between a court of chancery, refusing to decree the specific performance of a contract, and setting it aside: *Mortlock v. Buller*, 10 Ves. 292. It is also well settled, that a court of equity will not disturb an agreement that has been executed, although they would not have decreed a specific performance: *Willan v. Willan*, 16 Ves. 83. In the first case, the court would leave the party to his remedy at law. In the second they would refuse to interfere by directing the agreement to be canceled, the party having consummated his own act. But if there should be fraud, circumvention, deceit, or misrepresentation, a court of chancery would order the contract to be delivered up to be canceled. This case, then, being free from fraud, concealment and misrepresentation, and from the charge of a hasty and unadvised contract, one important question appears to be, can a court of equity interfere, under such circumstances, to avoid the contract? For, in my opinion, not to carry this contract into effect is to avoid it wholly. It would be well to consider whether this is a case coming within the rule. For if it be true that the respondents must rest the decree of the chancellor principally on the inadequacy of the value of the property to be exchanged; and, if it be true, that, in order to avoid such a contract, the inadequacy of price must amount to conclusive evidence of fraud: *Western v. Russell*, 3 Ves. & Bea. 187; *Willan v. Willan*, 16 Ves. 83; *Coles v. Trecothick*, 9 Id. 246, *per* Ld. Eldon, I do not see in what manner the opinion of his honor the chancellor can be supported.

There is no question so well calculated to generate a variety of opinion, as that which regards the value of a village lot or a farm in the country; and unless the disproportion should be gross

and palpable, it would be very difficult to estimate how much more had been given by A. for a lot than the price at which B. would value it.

This by the proofs is the precise case before us. The average value of the appellant's interest in the lots at Newburgh, as sworn to by six witnesses, is ten thousand eight hundred and fifty-six dollars; and this is corroborated by the fact that the father of the appellant estimated the lot east of Water street, several years since, at thirty thousand dollars. The average of the farms, as sworn to by witnesses, is twelve thousand six hundred and eighty-six dollars, and the difference about two thousand one hundred and eighty-six dollars, according to the highest estimate made by the witnesses of the respondents. The lowest estimate of the Newburgh lots by the respondents' witnesses is between five and six thousand dollars. That a difference of opinion should exist among the witnesses, both as to the value of the lots in Newburgh, and the farms of Ellison, is very natural. Every person at all acquainted with the price set upon real property, and that which is paid when sales do take place in the country and country villages, must be aware to what extent an honest difference of opinion does and always will exist. One will venture his fortune in the purchase of property which, in his judgment, will lay the foundation for a comfortable settlement of his family, while his immediate neighbor, with the same knowledge of all the circumstances, pronounces the purchase rash and injudicious. There is scarcely an instance in which a great difference of opinion does not exist upon the point, whether the purchaser has a good bargain or not. In the country and in country villages there is no settled criterion by which property can be estimated. It is not an uncommon circumstance for men to hold on upon real estate in the hope of getting their price, until the law interferes, and the sheriff is compelled to solve all scruples on the subject. In the present case, Ellison, a man of fortune, and competent to carry into effect his plans for the improvement of the two Newburgh lots, impressed with the idea of the growing importance of that village, and influenced, in all probability, by the expectation of the establishment of a navy yard in its vicinity, and being the owner of two thirds of the premises in question, exchanges certain farms in the country for the lots in Newburgh. He does this deliberately, freely, and with a full knowledge of the situation of his own property and that which he agreed to take in exchange. There is no ground for saying that there was in this

case, either fraud, surprise, misrepresentation, or deceit. The bargain was conducted by him throughout with great deliberation, and he consummated it with his eyes open. Under such circumstances, we are called on to say that mere inadequacy of price, and where there is much contradictory evidence, is of itself sufficient to prevent the court of chancery from decreeing the specific performance of the contract.

In the case of *Coles v. Trecothick*, 9 Ves. 246, Lord Eldon observed that inadequacy of price, unless it amounted to conclusive evidence of fraud, was not itself a sufficient ground for refusing a specific performance; and, although this was the case of an auction sale, the opinion was pronounced on the general question. In *Mortlock v. Buller*, 10 Ves. 292, the Lord Chancellor declined giving an opinion on the doctrine of inadequacy. In *Western v. Russell*, 3 Ves. & Bea. 187, the defense was gross inadequacy of consideration. The master of the rolls said that it was not necessary to determine the general question whether inadequacy of price might not be a ground for refusing performance, and he decided the case upon its special circumstances, and held that as the vendor was not alleged to be under any incapacity or deficiency of judgment, and set his own price and obtained it, and never expressed any dissatisfaction, but accused the purchaser of delay, the agreement should be carried into execution. Chancellor Kent admits that Lord Eldon and the master of the rolls had thrown doubt and distrust on this doctrine that inadequacy of price is of itself sufficient to prevent a specific execution.

In *Collier v. Brown*, 1 Cox, 428, it was expressly held on a bill for specific performance that if the parties bargained with their eyes open, and without imposition or surprise, mere inadequacy of price was not of itself sufficient to prevent the court from administering its usual equity. This is the doctrine of common sense and common honesty; for it may be asked, with great propriety, what right have we to sport with the contracts of parties fairly and deliberately entered into, and prevent them from being carried into effect? I cannot assent to the doctrine that inadequacy of price may, of itself, and without fraud or other ingredient, be sufficient to stay the application of the power of a court of chancery, to enforce a specific performance of a private contract to sell land.

To establish this doctrine in the state of New York, would, to my mind, be sanctioning a principle which would lead to very injurious results. Every member of this court must be

well aware how much property is held by contract; that purchases are constantly made upon speculation; that the value of real estate is fluctuating; and that there most generally exists an honest difference of opinion in regard to any bargain as to its being a beneficial one or not. To say, when all is fair, and the parties deal on equal terms, that a court of equity will not interfere, does not appear to me to be supported by authority: *Day v. Newman*, 2 Cox, 77; *Willan v. Willan*, 16 Ves. 83; *Western v. Russell*, 3 Ves. & Bea. 187; *Mortlock v. Buller*, 10 Ves. 292, and unless I am bound down by some rigid rule of law, I, for one, cannot consent to its introduction into our equity code.

I have not had time to analyze all the cases which have been cited, so as to bring them in review before the court. The earlier cases are very loosely reported; and we cannot, either from the decision made, or from the opinions of the court, form a satisfactory judgment on the particular facts; and from the doubt and disapprobation of Sir William Grant, the master of the rolls, and of Lord Eldon, I feel myself warranted in saying that the point is unsettled in England. Nor can I perceive why a contract for the sale of land, which is fair in all its parts, should not be carried into effect, as much as any other contract. In principle there is not, and there ought not to be, a difference.

There may be such inadequacy of price as, of itself, to be an evidence of fraud. But wherever this does not exist, and resort is had to the testimony of witnesses, and they differ in their valuation, as in the present case, the contract should be executed. In the case before the court, the average value of the farms, by six of the respondent's witnesses, is twelve thousand six hundred and eighty-six dollars. Six witnesses on the part of the appellant, and men, too, of great respectability, value the Newburgh lots at ten thousand eight hundred and fifty-six dollars. The difference is one thousand eight hundred and thirty dollars. How is it possible for any chancellor to decide upon the relative weight of such evidence? What can clearly be extracted from such a state of the case as this, that it is much better to carry the contract into effect, than that the rule of equity should depend on the judgment of a single individual. It is impossible for any court to appreciate all the considerations which influence men who enter into speculations of this kind. I admit that the case might present a different aspect if all the witnesses agreed in opinion. But here is a difference of opinion among some of the most respectable people in New-

burgh as to the value of the lots; and the witnesses for the appellant are supported by the former purchases made by Ellison, when he was as sane as he ever was.

There is another circumstance which has considerable weight with me, and it is that this contract is for the exchange of real property. It can not be denied that in such cases each party is anxious to put a high nominal value on his own land. It is a transaction wholly different, in this respect, from that of a cash sale. Although the Newburgh lots did not produce an income proportionate to the value put upon them by the appellant, yet the same objection existed as to the farms; for it appears by the evidence of Colden that they were very much out of repair.

Upon the whole, I am of opinion that there is not in the present case such an inadequacy of price as, of itself, amounts to conclusive evidence of fraud; that the contract between the appellant and Ellison, in his life-time, was entered into with a full knowledge of all the circumstances by Ellison, and after much deliberation; and that it is fair in all its parts, and that the respondents ought to be compelled specifically to carry it into effect: *Coles v. Trecothick*, 9 Ves. 246.

I have not entered at large into the consideration of the question raised on the argument as to the incompetency of Ellison, because it appeared to me that the weight of testimony on that point was clearly with the appellant, and all the facts in the case show that he concluded the bargain with great care and deliberation. If Drake Seymour is to be believed, and I think he is entitled to the most implicit credit, Ellison was perfectly competent to transact business throughout the whole negotiation, and when he was not so, the subject was never mentioned to him. Indeed, his own agent, McCoun, says, that when intoxicated he never knew him to attempt to do business. Where a general incapacity is proved, it is the duty of the adverse party to show competency when the contract was executed; but in the present case, all the evidence goes to show Ellison's competency to transact business when the negotiation commenced; and Drake Seymour expressly swears to it when the contract was executed.

As to the third point, that the appellant was not in a situation to give a good title to the village lots, either when he contracted, or when the deeds were to be exchanged, I am somewhat at a loss to reconcile the decree of his honor, the late chancellor, with itself. He says, on this point, "that the ap-

pellant was in default on the first of June, 1820. He ought to have shown himself able and ready to convey on that day;" and that he was in default, because the property was incumbered by a mortgage of five thousand dollars.

In conclusion, however, he says that he heard no evidence as to the complainant's title; that in the case of a specific performance, it is the usual course of the court to refer the inquiry as to title to a master. In my judgment, this inquiry extends not only to the actual title, but to incumbrances upon the property. In fact, the master is to inquire whether the party can make a deed according to his contract. If he can, it is sufficient, although he was not in a situation to do so when he entered into the contract, or at the time for performance, though it might be otherwise, where one party had been quickened by the other; or where time is of the essence of the contract, as where it relates to stocks or other personal chattels: 2 Pow. on Contr. 266, 267; 3 Eq. Abr. 690; 2 P. Wms. 630, 631; 7 Ves. 202; 10 Id. 315; 6 Id. 646; 2 Cox, 77; 2 Johns. 595, 614.

The appellant's remedy is lost at law, because the property was covered by a mortgage. But that is no objection in a court of equity: Newl. on Contr. 89. It is the peculiar privilege of courts of equity to interfere where the remedy is defective at law, if it be not against conscience; and if a contract be fair, it should be enforced: 8 Ves. 163; 2 Sch. & Lef. 347, 352; 9 Ves. 608.

I do not see anything in this cause which looks like an abandonment of the contract. It is clearly distinguishable from the cases in 1 Desaussure, 382, and 13 Ves. 238. Here was no necessity for punctuality, as the parties had taken possession according to the contract. Indeed, the state of Ellison's health was a sufficient excuse for not offering to convey at the day. I am satisfied that the general rule is as laid down by the appellant's counsel, and that this case does not come within the exceptions to it.

The cause must, therefore, be remitted to the court of chancery, that the chancellor may direct a master to inquire whether the appellant can give to the respondents a clear and unincumbered title to the Newburgh lots; and if he can, a decree for a specific performance according to the contract must be entered against the respondents.

BOWMAN, BRONSON, BURROWS, BURT, CRAMER, DUDLEY, HAIGHT, LYNDE, MCINTYRE, REDFIELD, THORN, WHEELER, and WOOSTER, Senators, concurred.

A majority of the court being for a reversal, it was thereupon ordered, adjudged and decreed, that one of the masters of the court of chancery be directed to inquire whether the said appellant has and can give a good title to certain lands in the town of Newburgh, in the county of Orange, which, by certain articles of agreement set forth in the appellant's bill of complaint, and proved in the said cause, the said appellant had agreed to convey to the said Thomas Ellison, deceased, in his life-time; and if his honor, the chancellor, upon the coming in of the report of the said master, shall be of opinion that such title can be given, that a proper decree be made for the specific performance by the appellant and the respondents of the said articles of agreement, and for the execution, by the proper parties, of all necessary conveyances, with suitable covenants for assuring the title, and requiring the appellant and respondents to procure all proper persons to join in such conveyance; and that the respondents in that case pay to the appellant his costs in the court of chancery to be taxed; and it was further ordered that the record be remitted, etc.

SUTHERLAND, J., was absent, through indisposition, and took no part in deciding this, or any of the causes during this session.

INADEQUATE CONSIDERATION AS GROUND FOR REFUSING SPECIFIC PERFORMANCE.—The point has been much discussed whether mere inadequacy, either in the price or in the subject-matter of a contract, is a sufficient ground for refusing a decree for specific performance. The rule adopted in the early English cases undoubtedly was, that inadequacy of consideration alone, if sufficiently great to make the bargain a hard and unconscionable one, would warrant a court of equity in denying relief by specific enforcement, and in leaving the party to his remedy at law: Fry on Spec. Perf. 128; Pomeroy on Contracts, sec. 194. And this rule has been followed in some of the American courts: *Clitherall v. Ogilvie*, 1 Desau. Eq. 250; *White v. Flora*, 2 Overt. 426; *Clement v. Reid*, 9 S. & M. (Miss.) 535. Thus in *Clitherall v. Ogilvie*, 1 Desau. Eq. 250, a young man just of age sold certain land for one fourth its value, and the court refused to compel him to execute the contract, and left the other party to his legal remedy. The chancellor said: "That being an unreasonable contract, and a very hard bargain, it would be both unreasonable and unjustifiable to decree a specific performance of the agreement." The decision in that case could probably have been justified, however, without putting it on such broad ground, since it appeared that the vendor was not only young, but inexperienced and ignorant of the real value of the property, and that the parties, therefore, were not dealing on equal terms.

MODIFICATION OF FORMER RULE.—It was soon discovered that to deny the relief of specific performance solely on the ground of the apparent inadequacy of the consideration, was to devolve upon the equity courts the duty of revising men's bargains, and to substitute the chancellor's opinion for that of the contracting parties as to the price which ought to be paid. This led Lord Eldon and Sir William Grant to modify the rule applicable to such

cases. It was accordingly established by those eminent jurists, that inadequacy of consideration is no ground for refusing to enforce a contract specifically unless it is so gross as to amount to conclusive or, at least, satisfactory evidence of fraud, or unless accompanied by other circumstances going to show fraud: Fry on Spec. Perf. 128, 129; Pomeroy on Contracts, sec. 194. This is now the settled doctrine in England, and that which generally prevails in the United States: *Coles v. Trecothick*, 9 Ves. 246; *Burrowes v. Lock*, 10 Id. 470; *Collier v. Brown*, 1 Cox Ch. Ca. 428; *Borell v. Dana*, 2 Hare, 450; *Bower v. Cooper*, Id. 408; *Abbott v. Swooder*, 4 De G. & Smale, 448; *Cathcart v. Robinson*, 5 Pet. 271; *Westervelt v. Matheson*, 1 Hoff. Ch. 37; *Viele v. Troy etc. R. R. Co.*, 21 Barb. 381; *Losee v. Morey*, 57 Id. 567. *Lobdell v. Lobdell*, 33 How. Pr. 369; S. C., 4 Abb. Pr. N. S. 61, 36 N. Y. 331; *Parmelee v. Cameron*, 41 N. Y. 392; *Margraf v. Muir*, 57 Id. 155; *Western R. R. Co. v. Babcock*, 6 Met. 357; *Lee v. Kirby*, 104 Mass. 420; *Bean v. Valle*, 2 Mo. 126; *Harrison v. Town*, 17 Id. 237; *Davidson v. Little*, 22 Pa. St. 245; *Sarter v. Gordon*, 2 Hill. Ch. 121; *Fripp v. Fripp*, Rice's Eq. 84; *Hale v. Wilkinson*, 21 Grat. 75; *White v. McGannon*, 29 Id. 511. The rule is thus stated by Lord Eldon in *Coles v. Trecothick*, 9 Ves. 246: "Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance." In *Viele v. Troy etc. R. R. Co.*, 21 Barb. 381, it is said that in order to warrant a refusal of a decree of specific performance, the inadequacy must be so gross as to be conclusive evidence of fraud, or to shock the moral sense of an indifferent person. The term "conclusive" is not exactly the proper one, as Mr. Pomeroy shows (Pomeroy on Contracts, sec. 193), for describing the degree of evidence of fraud which the inadequacy of consideration should furnish in order to justify a denial of a specific performance, since the existence of fraud in such cases is a question of fact, and this, like other facts, must be proved to the satisfaction of the court. The evidence necessarily varies in different cases, and, therefore, no cast-iron rule can be laid down. If the proof is such as to satisfy the court, it is enough. The evidence required in such cases, may, therefore, be better described as "satisfactory" rather than "conclusive." Inadequacy is nothing more than an ingredient in evidence: *Brown v. Cooper*, 2 Hare, 408.

EXTENT OF INADEQUACY REQUIRED.—From what has already been said it is clear that there can be no fixed standard by which to determine whether the inadequacy of consideration in any particular instance is so great as to prevent the specific enforcement of a contract. Each case must be governed by its own circumstances. Value is necessarily a variable quantity. As Lord Chief Baron Eyre well says in *Griffith v. Spratley*, 1 Cox Ch. Cas. 388: "The value of a thing is what it will produce, and admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man in the disposal of his property may sell it for less than another would; he may sell it under a pressure of circumstances which may induce him to sell it at a particular time. Now, if courts of equity are to unravel all these transactions, they would throw everything into confusion, and set afloat all the contracts of mankind." So too a purchaser of property may have special reasons for being willing to give a higher price for it than other persons would think it worth. As Vice-Chancellor Bruce says in *Abbott v. Swooder*, 4 De G. & Smale, 448, there are "fancy prices not regulated by intrinsic value." These are matters which must be taken into the account in every case of this kind. Inadequacy is not,

when standing alone, to be pronounced evidence of fraud unless the disparity between price and value is so great that it could not possibly have been caused by a more eccentric estimate, put upon the thing by the contracting parties. "The inadequacy must not be measured by grains:" Caldwell, chancellor, in *Gasque v. Small*, 2 Strob. Eq. 80. Thus in *Collier v. Brown*, 1 Cox Ch. Ca. 423, the contract price was two hundred and seventy-five pounds, and the vendor was afterwards offered four hundred pounds, and it was held that in the absence of any other facts tending to show unfairness in the transaction, the inadequacy was not sufficient to justify a refusal of specific performance. In *Bower v. Cooper*, 2 Hare, 408, a difference of seven or eight per cent. was held insufficient. In *Abbott v. Swoorder*, 4 De G. & Sm. 448, it appeared that the defendant, a solicitor, after personally examining the property, agreed to pay five thousand pounds for it, whereas the testimony indicated that its real value was three thousand five hundred pounds; but the court thought there was no ground for declining to enforce the contract. In *Lee v. Kirby*, 104 Mass. 420, the difference between forty-four thousand dollars and sixty thousand dollars, was held not to be a sufficient disparity to warrant a presumption of fraud or mistake in the contract. So, in *Coles v. Trecothick*, 9 Ves. 246, where land worth twenty-five thousand pounds was sold for twenty thousand pounds. So the difference between two thousand nine hundred dollars and three thousand five hundred dollars was held insufficient in *Westervelt v. Matheson*, 1 Hoff. Ch. 37. So, in *White v. McGannon*, 29 Grat. 511, where the defendant agreed to pay double what the land was worth he being perfectly competent to contract, and there being no proof of any unfairness, imposition, or fiduciary relation, although the land was covered with snow when the vendee examined it, and that circumstance was insisted on as evidence that he was misled, the vendor having a better opportunity than he to know the value of the land. In *Sarter v. Gordon*, 2 Hill Ch. 121, there was a sale of slaves, and the difference between one thousand eight hundred dollars and four thousand dollars, was held not to be a sufficient disparity between price and value to warrant a refusal of specific enforcement. A specific performance was decreed in *Harrison v. Town*, 17 Mo. 237, where the price was one third less than the value.

INADEQUACY COUPLED WITH OTHER CIRCUMSTANCES going to show fraud, imposition, oppression, or unfairness, in the contract, has frequently been held to be a sufficient ground for refusing a specific performance, even where such inadequacy was far less striking than in some of the cases already noticed. Indeed, when specific performance is denied on the ground of inadequacy, it is almost invariably accompanied by other evidences of fraud. Says Moncre, J., in *Hale v. Wilkinson*, 21 Grat. 75: "I think it will be found that in most, if not all, of the cases in which the court has refused to enforce the specific performance of a contract on the ground of inadequacy of consideration, there has been some other circumstance in connection with it which would have made it inequitable and unconscionable to make such a decree." He then refers to the principal case as a conspicuous illustration of the truth of this statement: "The case of *Seymour v. Delancy*, 6 Johns. Ch. 222, is a leading case of that kind. In that case there were certainly many and strong circumstances in addition to that of inadequacy of consideration, tending to show that it would not have been proper to decree the specific performance of the contract. The learned Chancellor Kent commences his opinion by saying: 'The question in this case is, whether it be fit and proper under all the circumstances to decree a specific performance of the contract of sale.' To be sure he then says that 'the main objection to the exercise of this power of

the court in the present case is the great inadequacy of price which the plaintiff was to allow for the two farms of which he seeks title.' But on pages 232 and 233 he details the additional circumstances which induced him to refuse to make the decree sought for. In that case, it is true, the chancellor expresses the opinion that mere inadequacy of price, though not of itself sufficient to set aside a sale of land, yet is sufficient to induce the court to refuse to decree a specific performance of a contract of such a sale. But the decision in that case was reversed on appeal: Same case, 3 Cow. 445; to which book, however, I have not now access."

Since the general rule now is that fraud is, in such cases, the ground upon which specific performance is refused, and that inadequacy of consideration is valuable only as evidence of fraud, it is not surprising that if the fraud exists there should be other proof of it than merely a gross disparity between the price and the value. It would be an anomalous case in which the inadequacy of consideration should be so great as to satisfy the court that there was imposition, overreaching, or oppression, in the contract, without being accompanied by other evidences of that fact. The following are some of the cases in which specific performance has been refused on the ground of inadequacy of consideration coupled with other circumstances tending to show unfairness or fraud in the contract. In *Campbell v. Spencer*, 2 Binn. 129, and also in *Henderson v. Hays*, 2 Watts, 148, there was, in addition to inadequacy of consideration, mental incompetence produced by intemperate habits, and the court declined to decree specific performance. In *Graham v. Pancoast*, 30 Pa. St. 89, a similar decision was made upon proof not only of inadequacy, but of mental weakness due to old age, and of great precipitancy in urging on the contract. So, in *Brooke v. Berry*, 83, it was held that inadequacy of consideration and mental weakness were sufficient grounds upon which to refuse to enforce a contract. So, in *Margraf v. Muir*, 57 N. Y. 155, specific performance was refused because the plaintiff, having knowledge of the real value of a lot, owing to his residing near it, concealed the truth from the defendant, who lived at a distance, and induced him to agree to sell it for eight hundred dollars when it was actually worth two thousand dollars. So, in *McCormick v. Mahin*, 5 Blackf. 509, where a weak-minded defendant was induced by misrepresentation to sell a legacy worth thirteen thousand dollars for four thousand five hundred dollars. A similar decision was made in *Howard v. Edgell*, 17 Vt. 9, where there were other suspicious circumstances in addition to gross inadequacy of consideration. So, in *Fish v. Leser*, 69, Ill. 394, where a weak-minded person, having an imperfect acquaintance with the English language, and being inexperienced in business matters, was prevailed upon to sell property worth thirty thousand dollars for twenty-one thousand dollars, his agent being also the agent of the purchaser and actively concerned in persuading him to enter into the contract; see, also, *Cathcart v. Robinson*, 5 Pet. 263; *Byers v. Surget*, 19 How. U. S. 303.

VOLUNTARY CONTRACT NOT ENFORCED.—Where a contract is entirely voluntary or without consideration, or is in effect and substance a mere gift, it will not be specifically enforced, for equity will not compel a party to be generous: *Shackelford v. Handley*, 10 Am. Dec. 753; *Black v. Card*, 2 Har. & G. 100; *Curlin v. Hendricks*, 35 Tex. 225; *Callaghan v. Callaghan*, 8 Clark & Fin. 374. But, on the other hand, a voluntary conveyance, free from fraud, will not be set aside: *Stubblefield v. Patterson*, 3 Hayw. (Tenn.) 128. Inadequacy of consideration, however gross, is no defense to a suit for specific performance, if there is united with the money consideration the further consideration of love and affection: *White v. Thompson*, 1 Dev. & Bat. Eq. 493.

SUBSEQUENT DEPRECIATION NOT REGARDED.—Since inadequacy of consideration is important in these cases only as evidence of fraud in the inception of the contract, it will be no ground for refusing specific performance, unless it exists at the making of the contract. Subsequent fluctuations in value can not affect the case: *Pomeroy on Contracts*, sec. 195; *Willard v. Taylor*, 8 Wall. 557; *Hale v. Wilkinson*, 21 Grat. 75. The case last cited is a valuable one on this point. A tract of land in Virginia, which was worth six thousand dollars in gold, was sold during the war for ten thousand dollars, in confederate money. The money was to be paid at a future day, and was not paid until after due. At the time of payment, the confederate money given (and received) for the land, was worth only three hundred and eighty-five dollars in gold; but the court, nevertheless, decreed a specific performance of the contract. A contrary conclusion was reached in *Hudson v. King*, 2 Heisk. 560, where it was held that a contract made during the war for the purchase of property at fictitious prices would not be enforced. See, also, *Perkins v. Wright*, 3 Har. & McH. 324; *McCarty v. Kyle*, 4 Cold. 348, where it was laid down, that if a bargain became hard and unreasonable by a change of circumstances it would not be enforced.

SALES AT AUCTION.—Where a sale is made at auction there is even less inclination on the part of the court, than in ordinary cases, to refuse specific performance for inadequacy of consideration, for obvious reasons: *Borell v. Dann*, 2 Hare, 450; *White v. Damon*, 7 Ves. 30; *Ayers v. Baumgarten*, 15 Ill. 444. But where property was sold at a sheriff's sale for one tenth of its value, and there were other evidences of fraud and oppression, the court refused to enforce the contract: *Clement v. Reid*, 9 S. & M. (Miss.) 535.

SALES OF EXPECTANCIES form an exception to the rule that inadequacy of consideration alone is no ground for refusing specific performance; or rather, inadequacy in such cases is more readily accepted as evidence of fraud than in ordinary contracts: *Fry on Spec. Perf.* 132; *Pomeroy on Contracts*, sec. 191, 192; *Playford v. Playford*, 4 Hare, 546; *Story Eq. Jur.*, sec. 336.

DISCRETION EXERCISED BY THE COURT.—It is often said that the specific performance of a contract is a remedy which is not a matter of right, but rests in the discretion of the court: *Hill v. Ressegieu*, 17 Barb. 166; *Bruce v. Tilson*, 25 N. Y. 202. "But," says Lord Eldon, in *White v. Damon*, 7 Ves. 35, "that is not an arbitrary, capricious discretion. It must be regulated on grounds that will make it judicial." The remedy can be denied only where the contract is tainted with manifest unfairness, inequality and injustice. If it is shown to be fair in all its parts, free from fraud and imposition, and founded on good consideration, it is a matter of course to enforce it in equity: 2 *Story Eq. Jur.*, sec. 769; *Cabeen v. Gordon*, 1 Hill Ch. 51. The remedy, in such a case, can be refused only "by an act of arbitrary power:" *Hale v. Wilkinson*, 21 Grat. 80.

INADEQUACY AS DEFENSE OR GROUND OF RESCISSION.—It is said in *Pomeroy on Contracts*, sec. 194, that "inadequacy as a negative defense and as an affirmative ground for the relief for rescission, are put upon an equal footing and governed by the same rule." This is unquestionably true to the extent that fraud is the specific ground of defense in the one case, and of affirmative relief in the other, and that the inadequacy must in both cases be so gross, where it stands alone, as to furnish satisfactory evidence of the fraud. But it is the undoubted doctrine of many of the decisions that the stringency of proof, insisted upon in the latter case, is not always required in the former. The court will not unfrequently decline to enforce a contract specifically where it would also refuse to set it aside: *Gasque v. Small*, 2 Stroob. Eq. 72;

Rodman v. Zilley, 1 Saxt. Eq. N. J. 320; *White v. Flora*, 2 Overt. 426; *Davidson v. Little*, 22 Pa. St. 245; *Cathcart v. Robinson*, 5 Pet. 276. In other words, less evidence will be satisfactory in the one case than in the other. Where specific performance is asked, and there is great inadequacy, together with other suspicious circumstances connected with the contract, the plaintiff must, by his proof, remove the taint. In other words, he must show that the contract is fair. But where rescission is sought, fraud must be affirmatively shown. That inadequacy of consideration alone is no ground for rescission, unless it amounts to proof of fraud, see *Osgood v. Franklin*, 7 Am. Dec. 513, and note. See, also, Fry on Spec. Perf. 128; Pomeroy on Contracts, sec. 193.

The principal case is a leading one on this subject, and is cited in nearly all the American decisions above referred to. See, also, the following cases, where it is also cited on other points: *Harris v. Knickerbocker*, 5 Wend. 654; *Ferguson v. Union Furnace Co.*, 9 Id. 346; *Edgerton v. Peckham*, 11 Paige, 360; *Best v. Stow*, 2 Sand. Ch. 299; *Cleveland v. Burrill*, 25 Barb. 537; *Burwell v. Jackson*, 9 N. Y. 544; *White v. Schuyler*, 31 How. Pr. 41; 1 Abb. Pr. N. S. 303.

OSGOOD v. MANHATTAN COMPANY.

[3 COWEN, 612.]

HEIRS OR DEVISEES are not affected by the admission of executors; hence a petition verified by the executors is not admissible as against the heirs to prove the facts therein stated.

JUDGMENTS AGAINST EXECUTORS are not evidence against heirs.

CUMULATIVE EVIDENCE improperly admitted is good ground for reversal.

ADMISSIONS by one man are not evidence against another unless they have a joint interest.

DECLARATIONS of a grantor after executing a conveyance, are not admissible to the prejudice of his grantee.

ERROR to the supreme court in an action of assumpsit brought by the president and directors of the Manhattan company, defendants in error, who were plaintiffs below, against Walter F. Osgood, and others, heirs and devisees of Maria Osgood, the mother of the said Walter, upon certain promissory notes indorsed by the said Maria Osgood. The principal issue was as to whether assets had come to the hands of the defendants by descent or devise. It appeared that Maria Osgood had in her life-time, in consideration of love and affection, conveyed certain land, by several deeds, to her three daughters, who, with their husbands, were made defendants. The plaintiffs insisted that these conveyances were fraudulent and void, because the said Maria was insolvent at the time, and that, therefore, the land attempted to be conveyed was assets in the defendants' hands. To prove the insolvency of the said Maria Osgood, the plaintiffs

produced the petition of her executors to the surrogate, stating that her personal estate was insufficient to pay her debts, and praying the aid of the surrogate, to which petition was attached an account between the executors and the estate, and an account of the personal property and debts, omitting to say when they arose, or whether they were due when the conveyances were made, a considerable part of the debts consisting of indorsements for the accommodation of Walter F. Osgood, which accounts were sworn to by the executors. But it appeared that before any order was made, the executors declined to proceed on the ground that they had been acting under a misapprehension. The defendants objected to the admission of this evidence, but the objection was overruled. Verdict and judgment for the plaintiffs, whereupon the defendants brought the case here on exceptions, the only one considered by this court being that taken to the admission of the evidence above mentioned.

S. Jones and Tulcott, Attorney-general, for the plaintiffs in error, contended that the evidence was inadmissible, because the defendants, as heirs and devisees, were not to be affected by the acts or admissions of the executors, and they cited: *Phoenix v. Dey*, 5 Johns. 412; *Grant v. U. S. Bank*, 1 Cai. Cas. 121; *Leeds v. Marine Ins. Co.*, 2 Wheat. 380; *Jackson v. Hoag*, 6 Johns. 59; *Mason's devisees v. Peters's administrators*, 1 Munf. 437; *Mooers v. White*, 6 Johns. Ch. 360. They referred to *Hemings v. Robinson*, Barn. 436; *Arnold v. Bell*, 1 Hayw. 397, and note; *Grey v. Palmers*, 1 Esp. N. P. C. 135; *Whitney v. Ferriss*, 10 Johns. 66; *Hackley v. Patrick*, 3 Id. 536; *Smith v. Ludlow*, 6 Id. 267; *Hartford Bank v. Hart*, 3 Day, 493 [3 Am. Dec. 274], to show generally that the confessions of one will not bind another, simply because there happens to be a community of interest.

J. V. Henry, for the defendants in error, contended that the evidence was admissible because the petition was the act of the executors of the person through whom the defendants claimed, and that the object of it was not to charge the defendants with a debt, but simply to establish the collateral fact of insolvency, and he referred to *Haddow v. Parry*, 3 Taun. 303; *King v. Hardwicke*, 11 East, 578; 1 Phil. Ev. (2 Am. ed.) 72, 191, 192, and Gilb. Ev. 59 (ed. of 1791) note (v), as establishing a similar principle in analogous cases.

SUDAM, Senator. One of the questions presented for the consideration of the court is, whether the petition to the surrogate by the executors of Mrs. Osgood, stating that the personal

estate of the deceased was insufficient to pay her debts, and requesting the aid of the surrogate in the premises, pursuant to the statute, etc., to which was annexed a statement of her personal effects, sworn to by the executors, was properly admitted by the judge at the circuit, as evidence of her insolvency at the time she executed to her daughters the deeds of the lots in Cherry street. This testimony was admitted by the judge who presided at the circuit; and his decision was confirmed by the supreme court. It now comes to this court on a bill of exceptions to his opinion on this and other points. Having myself arrived at the conclusion that this evidence should not have been received, it will be unnecessary for me to consider the other points in the cause.

In order to make out their case, the plaintiffs below were bound to show affirmatively that the defendants were the heirs and devisees of Mrs. Osgood. To do this they were compellable to make out, in proof, that the voluntary conveyances to her daughters were void, under the statute to prevent fraudulent conveyances, as to creditors, by reason of her insolvency when she executed the deeds; and the petition and schedule were offered as *prima facie* evidence of this.

It will be recollected that this petition was never acted on; and that the executors declined proceeding upon it, on the ground that they had made it out under a misapprehension. The statement of the debts offered to the surrogate did not specify the time when they were contracted; so that we can not from this decide whether they arose before or after the conveyances were executed; and it was made by persons having only an interest in right of their wives, in the premises in question, except Walter F. Osgood, who was, in fact, interested to avoid his mother's conveyance.

It is well settled that if improper evidence be given, although it may be cumulative only, the judgment must be reversed; for we cannot say what effect such evidence may have had on the minds of the jury: *Marquand v. Webb*, 16 Johns. 89. This evidence should not, in my opinion, have been admitted at all against either the heirs or devisees, admitting that the insolvency of Mrs. Osgood, at the time of executing the deeds, rendered them void as to creditors. Upon this point I do not mean to give an opinion; but the acts of executors ought not to bind heirs or devisees unless in the case of an actual decree of sale by the surrogate. In the present case, too, the executors themselves, after presenting the petition, declined

acting upon it. Under such circumstances, especially, the petition and schedule should not be received against the heirs and devisees; and particularly in this case, where it goes to charge them personally with the debt of the ancestor. The form of entering judgment for the plaintiffs below, whether against the lands of the ancestor, or against his land and the person of the defendants, can not alter our decision.

Even a judgment against an executor is no evidence against the heir: *Mason's devisees v. Peters's administrators*, 1 Munf. 437, 455, 456. If this is inadmissible against the heir merely to fix the amount of the demand, upon what principle can it be said that an *ex parte* statement by executors, though under oath, shall be evidence for a much more important purpose; to avoid a conveyance of real estate and charge the persons and estates of heirs and devisees as upon a false plea. It was the duty of the plaintiffs below substantially to make out their case, before the defendants could be called upon for their defense; and to effect this, it was necessary for them to prove that the conveyances by Mrs. Osgood to her daughters were void. Could this be done by admission of executors, or any other persons, who were not grantees? I think not. Mrs. Osgood's own confessions, after she had executed the deed to her daughters, could not have been admitted: *Phoenix v. Day*, 5 Johns. 412. And will it be contended that executors named in her will can make an admission of more effect than her own? It appears to me this point is settled by the opinion of the late chancellor in *Moore v. White*, 6 Johns. Ch. 360, and *Arnold v. Bell*, 1 Hayw. 397, note.

It will be recollected that the conveyances to the daughters were in severalty. There could, therefore, be no joint interest in them till they were avoided. To accomplish this, any acts done by the executors, without the concurrence of the devisees, could not be used as evidence upon any principle. To warrant receiving the admissions of one, in prejudice of another, they must have a joint interest in possession, not a mere community of interest: *Gray v. Palmers*, 1 Esp. N. P. Cas. 135; *Hackley v. Patrick*, 3 Johns. 536; *Smith v. Ludlow*, 6 Id. 267, 269; *Whitney v. Ferriss*, 10 Id. 66.

The case cited at the bar, of the *King v. Hardwicke*, 11 East, 578, does not affect the question. There, the admission of a parishioner, liable to be assessed for taxes, was received on the ground that the parish was an aggregate company of which he was a member. Besides, I think the ground upon which that

case was put very questionable, at least; and I find that in Connecticut it has been directly overruled as to a corporation aggregate: *Hartford Bank v. Hart*, 3 Day, 493. On the whole, I am of opinion that the evidence was improperly admitted; that the judgment must, therefore, be reversed; that the record be remitted, and a *venire de novo* issue from the court below.

The court being unanimously of this opinion, it was thereupon ordered, adjudged and decreed that the judgment of the supreme court be reversed, with costs in error, to be taxed for the plaintiff in error; and that the transcript be remitted to the said supreme court, and that the said court award a *venire facias de novo*.

SANFORD, chancellor, being a stockholder in the company, gave no opinion.

GRANTOR'S DECLARATIONS AS EVIDENCE.—See *Jackson v. Bard*, 4 Am. Dec. 267; *Barrett v. French*, 6 Id. 241; *Reichart v. Castator*, Id. 402; *Drum v. Simpson*, Id. 490; *Dorsey v. Dorsey*, Id. 506; *Taylor v. Adams*, 7 Id. 665; *Hatch v. Straight*, 8 Id. 152; *Share v. Anderson*, 10 Id. 421.

THALLHIMER v. BRINCKERHOFF.

[3 COWEN, 623.]

CHAMPERTY, MAINTENANCE AND BARRATRY, the policy and history of the law of, considered and explained.

A RIGHT OF ACTION could not be assigned at common law. This rule has been very generally superseded at law, and never prevailed in equity.

PART OF A CAUSE OF ACTION can not be transferred.

MAINTENANCE.—Maintaining the suit of another is lawful, if the person so maintaining has an interest in the suit, vested or contingent, or is connected with the suitor in some social relation, or by the ties of affinity or consanguinity, or in the relation of landlord and tenant, master and servant, or attorney and client, or is moved by the impulse of charity.

A CONTRACT BETWEEN AN heir and his brother-in-law, by which the latter promised to bear one half of the expenses to be incurred in certain actions about to be brought, in consideration that the former would convey him one fourth of the property which should be recovered, is valid; and if the suits are brought and compromised, and the property conveyed by the heir, the brother-in-law may, in an action of *indebitatus assumpsit* for money had and received, recover his share of the proceeds.

MAINTENANCE.—The law of maintenance is intended only to prevent the interference in a suit of strangers having no interest in the litigation, and standing in no relation of duty to the suitor.

A HUSBAND WHOSE WIFE may possibly be heir to a claimant may lawfully maintain the suit of the latter upon an agreement to share its proceeds.

ERROR to the supreme court, in an action of assumpsit for money had and received, money lent, etc., and on an *insinul*

computassent brought by the plaintiff in error, who was also plaintiff below, to which non-assumpsit was pleaded. At the trial below, the plaintiff produced in evidence a written agreement between himself and one Henry R. Teller, dated April 10, 1817, which was drawn up and witnessed by the defendant. The agreement recited that the said Teller, as heir at law to his father, laid claim to certain real property in New York, and that it was his intention to institute suits to recover the same; and that the plaintiff having intermarried with a sister of the said Teller, was justly, though not legally, entitled to a portion of the property. It was, therefore, mutually covenanted between the parties to said agreement, in substance, that the plaintiff should pay one half the expenses of suits brought to recover said property in case the said Teller was unsuccessful, but only one fourth of said expenses, if he was successful, and that the said Teller should convey to the plaintiff one fourth part of the property recovered. It was further proved that the defendant, as attorney of the plaintiff and the said Teller, commenced a number of suits to recover said property; and that, under a power of attorney from Teller, and without the plaintiff's knowledge, he compromised said suits, and on such compromise received fifty-four thousand dollars, besides costs of suits, one fourth of which sum the plaintiff claimed. The defendant moved for a nonsuit on the ground that the agreement relied on was void for champerty, which motion was allowed, a motion for a new trial overruled, and judgment of nonsuit entered accordingly: 20 Johns. 386. The plaintiff thereupon brought the case here on exceptions.

S. G. Huntington and S. Jones, for the plaintiff in error, contended: 1. That the agreement was not unlawful on the ground of champerty or maintenance, because the plaintiff, by reason of his relationship with Teller's family, had an interest in the matter, and, therefore, was not guilty of officious intermeddling: 4 Bl. Com. 134, 135; 3 Burn, J. 116; 2 Chit. O. L. 233, note (a); 5 Com. Dig. 16, Maintenance (A); Hawk, P. C., book 1, ch. 83; secs. 1, 13, 17, 18, 21, 22; ch. 84, sec. 19; *Wickham v. Conklin*, 8 Johns. 220; Bac. Ab., Maintenance (B); 2 Roll. Ab. 115; Bro. Ab., Maintenance, pl. 7, 14, 15, 17, 18; 15 Vin. 162, Maintenance (H); 2 Inst. 563, 564; *Master v. Miller*, 4 T. R. 340, *per* Buller, J.; 2. That even if the agreement were unlawful, the defendant could not object to it, because he merely represented Teller, who was estopped by having acted under the agreement, and because it did not appear that the defendant

was authorized by Teller to make the objection; 3. That the defendant had received one fourth of the money to the plaintiff's use; 4. That the objection of the non-joinder of Teller could not be made at this stage of the cause.

H. Bleecker and A. Van Vechten, for the defendant in error, contended: 1. That Teller should have been joined with the plaintiff in the action: *Ziele v. Campbell*, 2 Johns. Cas. 382; 2. That the action would not lie, because under the agreement it was one fourth of the land, and not the money that was bargained for; 3. That the agreement was void within the statute of champerty and maintenance: 1 R. L. 172, sec. 1; *Jackson v. Ketchum*, 8 Johns. 479; 4. That the exception allowing one having an interest, or being related to the parties to assist in bearing the expenses of a suit, applied only to cases of maintenance, and not to champerty, and that, in any case, the plaintiff's interest was not such as to bring him within the exception; 5. That, as the agreement was unlawful and criminal, and, therefore, absolutely void, the defendant, or even Teller himself, might raise the objection, and that the plaintiff could not recover, even if Teller had consented that the defendant should hold the money for his use: *Whitaker v. Cone*, 2 Johns. Cas. 58; *Helding v. Pitkin*, 2 Cai. 147; *Hunt v. Knickerbacker*, 5 Johns. 327; *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penahuna*, 4 Id. 466; *Morck v. Abel*, 3 Bos. & P. 35; 6. That the plaintiff should have proved notice to the defendant to pay over the proportion of the money claimed.

SANFORD, Chancellor. Champerty, maintenance, and barratry were defined as offenses in very early stages of the English law. These practices seem to have been then common in England; and they were denounced, not only as sins very heinous in themselves, and highly injurious to the peace of society, but also as offenses which actually interrupted the course of public justice. The excitement of suits is an evil, when suits are unjust; but when right is withheld, and the object of a suit is just, to promote the suit is to promote justice. That a resort to the public tribunals for justice should produce injustice, can be true only where the administration of justice is weak or corrupt, or where the laws are very imperfect. Where the administration of justice is firm, pure, and equal to all, and where the laws give adequate redress for groundless suits, it is not easy to conceive that mischief can arise from opening the courts of justice to all suitors, or from contracts by which the fruits of a

suit may be divided between him who has the right of action and him who has contributed advice, expense, or exertion to institute the suit, or prosecute it to effect. The right of litigating may be abused; and proper remedies for groundless and vexatious litigation must exist; but the remedies for the abuse of this right, should be such as not to impair the free use of the right itself. As the justice or injustice of the claim can not be known before the termination of the cause, the checks upon unjust litigation, must in general consist, not in excluding the suit or the suitor from the courts, but in redress following the decision of justice upon the merits of the cause.

The Roman law, by its provisions for preventing groundless and vexatious suits, required that the plaintiff should take an oath that the suit was not commenced from malice, and that he believed his cause to be legal and just. The defendant was required to swear that in his belief the plaintiff had no just claim. The advocates on both sides were required to take similar oaths. If the plaintiff failed in his suit, he was fined in a sum which was sometimes a tenth part of the demand; and in cases of great malice and vexation, the plaintiff was further punished by a decree of ignominy: Inst. Book 4, tit. 16; Code, Book 2, tit. 59; Dig. Book 5, tit. 1, 79; Inst. Book 4, tit. 1, 33; Huber. Prælect. 457, 1478; Wood's Civ. Law, 341.

The English doctrine of maintenance arose from causes peculiar to the state of the society in which it was established. The great reason for the suppression of champerty and maintenance, was an apprehension that justice itself was endangered by these practices: Blackstone, 4 Com. 135, speaks of this offense as perverting the process of law into an engine of oppression. In the case of *Slywright v. Page*, 1 Leon. 167, it was said by the whole court of common pleas, that the meaning of the statute of 32 Hen. VIII. concerning maintenance, "was to repress the practices of many, who when they thought they had title or right to any land, for the furtherance of their pretended right, conveyed their interest in some part thereof to great persons, and with their countenance did oppress the possessors." The power of great men, to whom rights of action were transferred, in order to obtain support and favor in suits brought to assert those rights, the confederacies which were thus formed, and the oppression which followed from the influence of great men, in such cases, are themes of complaint in the early books of the English law. While the power of nobles and great men was felt in the administration of justice, these practices seem to

have produced real and great evils. In that state of things, instead of invigorating and purifying the administration of justice, as the direct remedy for such evils, the laws concerning champerty and maintenance were established as penal regulations intended to operate upon the parties to these transactions.

In modern times, and since England has enjoyed a pure and firm administration of justice, these evils are little felt; and champerty and maintenance are now seldom mentioned, as occurring in fact, or as producing mischief in that country. The statutes for the limitation of actions, the statute of frauds, the extension of the action for malicious prosecutions, and the costs given against unsuccessful parties, have all taken place since the law of maintenance was established; and all these alterations have contributed to prevent or punish groundless and vexatious litigation.

It was a principle of the common law, that a right of action could not be transferred by him, who had the right, to another. When we seek the reason of this rule, we find it in the motive already mentioned, an apprehension that justice would fail, and oppression would follow if rights of actions might be assigned. "Nothing," says Coke, Co. Lit. 114, a., "nothing in action, entry, or re-entry, can be granted over; for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed." Feeble, partial, and corrupt must have been the administration of justice where such a reason could have force. In early times this rule concerning rights of action was rigorously enforced. As the entire right of action could not be assigned, so no part of it could be transferred, and no man could purchase another's right to a suit, either in whole or in part. Hence, the doctrine of maintenance which prohibits contracts for a part of the thing in demand, was adopted as an auxiliary regulation to enforce the general principle which prohibited the transfer of all rights of action. But the rule of the common law, that rights of action cannot be assigned, has in modern times been reversed; the apprehension that justice would be trodden down, if property in action should be transferred, is no longer entertained; and the ancient rule now serves only to give form to some legal proceedings. In the courts of equity this rule was never followed, and those courts have always considered and treated the rule as unjust, and have supported assignments of rights of actions. Experience has fully shown, not only that no evil

results from the assignment of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in action, as well as of property in possession.

The general law, both in England and here now is, that rights of action may be transferred; and as the laws concerning maintenance are still in force, the present state of the law is, that while an entire right of action may be transferred to a purchaser, with complete effect, a contract to transfer a part of a right of action is void. The primary rule forbidding the assignment of a right of action has ceased; but the auxiliary sanction concerning the assignment of a part of such a right, remains in force. The English judges feeling that the original reasons for the law of champerty and maintenance had ceased, have gradually mitigated that law, by interpretations and exceptions; and the present state of English opinion on this subject may be seen in 4 T. R. 340, 341; where Buller, J., expresses himself in terms which do not disguise his contempt for the whole doctrine of maintenance. In many of the states of this Union, these laws are not in force; and the want of them is said to be no inconvenience.

These observations are made to show that in examining the English law and English authorities concerning champerty and maintenance, we must, in order to ascertain the sense and extent of their doctrines, bear in mind the state of society which produced them, the evils for which they were intended to afford a remedy, and the different state of things to which they are now applicable. It is only by this recurrence to history that we can trace the true reasons of the English law; the causes of the horror with which the maintenance of suits was viewed in early times; the decline and fall of the rule of the common law, that things in action were not vendible; and the different views which at different times have had influence upon the judicial expositions of the laws of maintenance in England.

Our statute concerning champerty and maintenance is a compilation of the several English statutes relating to the same subjects, and it declares certain contracts void. This statute, throughout, makes or supposes a distinction which before prevailed in the rules of the common law, between maintenance which is innocent and that which is unlawful. To maintain the suit of another is unlawful, unless the person maintaining has some interest in the subject of the suit, or unless he is connected with the suitor in some social relation. These are the

exceptions to a general rule; and they are exceptions which rest upon the strongest ground of reason, as well as the support of authority.

Where the person promoting the suit of another has any interest whatever in the thing demanded, distinct from that which he may acquire by an agreement with the suitor, he is in effect also a suitor, according to the nature and extent of his interest. To deny to such a person the benefit which he might receive from a suit conducted mainly or partly for the benefit of another, would be to close the temple of justice against all persons not parties to the suit, and yet having interest in the subject of litigation, which may be affected by the determination of the cause. It is accordingly a principle, that any interest whatever in the subject of the suit is sufficient to exempt him who gives aid to the suitor from the charge of illegal maintenance. Whether this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to him who has such an interest to participate in the suit of another, who also has or claims some right to the same subject: *Bac. Abr., tit. Maintenance, B.*, and the several authorities there cited.

Where there is consanguinity or affinity between the suitor and him who gives aid to the suit, the voice of nature and the language of the law equally declare that such assistance is not unlawful maintenance. The relation of landlord and tenant, that of master and servant, acts of charity to the poor, and the exercise of the legal profession, are all cases in which it is not unlawful to give aid in the conduct of suits before the courts of justice.

Upon all such cases these laws were never intended to operate. They were intended to prevent the interference of strangers having no pretense of right to the subject of the suit, and standing in no relation of duty to the suitor. They were intended to prevent traffic in doubtful claims, and to operate upon buyers of pretended rights, who had no relation to the suitor or the subject, otherwise than as purchasers of the profits of litigation.

It has been urged that champerty and maintenance are distinct offenses; and that champerty is illegal in many cases, in which maintenance, in other modes, would be lawful. If principles are considered, it seems to be of little moment whether he who maintains the suit of another receives his reward from the subject of the suit, or from any other property of the suitor. Champerty is one species of maintenance; but the authorities

do not declare contracts for a part of the thing in demand universally unlawful. The distinction made by the books, between interference which is illegal and that which is lawful, consists in the rule, and the exceptions already stated; and where maintenance is lawful, as in the case of interest in the subject, or relation to the suitor, a contract to divide the subject of the suit, which is maintenance in a particular form, is also legal.

In this case, the wife of Thallhimer was the sister of Teller, and this relation recited in the contract evidently led Thallhimer and Teller to the contract itself. Thallhimer did not obtrude himself into the concerns of a stranger; but he agreed to give aid to his relative, as he might justifiably do. He was not the promoter of litigation in which he had no concern. His wife might inherit Teller's lands; and this reason alone exempts the contract before us from the imputation of champerty, or illegal maintenance. It is immaterial to this question whether the contingencies which must occur before Teller's sister could inherit, were such as to render that event probable or not. She might become the owner of these lands as the heir of Teller; and this potential interest was a sufficient reason that her husband should join in measures to recover the lands.

The charge of champerty or maintenance being the only objection made to this agreement, and that objection not being applicable to this case, the agreement is valid. The action now brought against Brinckerhoff is assumpsit for money received by him for the use of Thallhimer. The contract not transferring any right in the lands themselves to Thallhimer, the legal title remained in Teller, who had power to bring suits, to compromise the claim, and to release the legal title. Teller did compromise the claim, and did release the legal title to the possessors of the land for a sum of money; this was done by Brinckerhoff, acting under a power from Teller, and the money was received by Brinckerhoff. After these facts had occurred, there never could be a conveyance of any right in the lands, from Teller to Thallhimer; and the agreement could have effect only by considering the money received as substituted for the land, in respect to the rights of Thallhimer under the contract. This construction gives effect to the contract, and must be adopted as the sense of the contract itself, and as a necessary consequence from the events succeeding the contract, which rendered any conveyance of a right in the lands impossible. The compromise was valid both in respect to Teller and the possessors of the land; and if this agreement now has any effect,

it must operate upon the money received, as it might have operated upon the land, had the land itself been specifically recovered. If this contract could be defeated by the acts of Teller and Brinckerhoff, in which Thallhimer had no part, and over which he had no control, the most flagrant injustice would be done to Thallhimer. The sense of the contract evidently is that in the event of success, Thallhimer shall have one fourth of the property, whether the fruits of the claim should be realized in one species of property or another.

The rights of Thallhimer in this suit arise from his agreement with Teller, from the acts of Teller in authorizing the compromise, and from the acts of Brinckerhoff in commencing the actions of ejectment, in making the compromise, and in receiving the money. In commencing the actions of ejectment, Brinckerhoff acted as the attorney of both Thallhimer and Teller. In making the compromise, he acted as the agent of Teller, in respect to the possession of the land; for Teller having the legal title, he alone could give a power to compromise. But as Brinckerhoff had full knowledge of the rights of Thallhimer under the agreement, he may be justly regarded, in making the compromise, as the agent of both Thallhimer and Teller, in respect to their rights, and according to their respective interests. In these circumstances, the action for money received for the plaintiff is entirely proper; the use of that form being to allow the introduction of the express contract, and all the acts of the parties, and also to give effect to any tacit promise which law and justice may infer from all the facts of the case. The agreement determines that Thallhimer's share of the money is one fourth part; and Brinckerhoff has not paid, as he ought not to have paid, this fourth part to Teller. This share is money belonging to Thallhimer, and remaining in the hands of Brinckerhoff. Thus the objections made to the form of this suit appear to be destitute of weight.

My opinion is that the judgment of the supreme court should be reversed, and that the cause should be again sent to trial.

The court being unanimously of this opinion, it was thereupon ordered, adjudged and decreed, that the judgment of the supreme court in this cause be reversed, with costs in error to be taxed for the plaintiff in error, and that the transcript be remitted to the said supreme court, and that the said court award a *venire facias de novo*.

MAINTENANCE DEFINED.—Maintenance is “an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with

money or otherwise, to prosecute or defend it." 4 Bl. Com. 134; Burrill's Law Dict., tit. Maintenance; *Andrews v. Thayer*, 30 Wis. 228. In Bouvier's Law Dict., tit. Maintenance, it is defined to be "a malicious, or at least, officious interference in a suit in which the offender has no interest to assist one of the parties to it against the other, with money or advice, to prosecute or defend the action without any authority of law." 1 Russ. Cr. 176. In *Brown v. Beauchamp*, 5 T. B. Mon. 413, the court adopting Hawkins's definition, say: "Maintenance signifies an unlawful taking in hand, or upholding of quarrels or sides to the disturbance or hindrance of common right." It is said in *Dorwin v. Smith*, 35 Vt. 69, that the term "seems now to be confined to the intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing litigation." And it was held in *Fletcher v. Ellis*, 1 Hempst. 300, that it is necessary, in order to constitute the offense, that there should be actual assistance in the suit, and that a mere offer of assistance will not suffice.

CHAMPERTY DEFINED.—Champerty is a species of maintenance, and is defined by Blackstone as "being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." Hawkins and Coke omit from their definitions the statement that the champertor is to carry on the party's suit at his own expense: 1 Hawk. P. C., c. 84, sec. 1; Co. Lit. 368, b.; *Lathrop v. Amherst Bank*, 9 Met. 489. So in *Scobey v. Ross*, 13 Ind. 117, it was held not to be a necessary ingredient in the offense that the champertor should bind himself to pay expenses. To the same effect is *Backus v. Byron*, 4 Mich. 535. Mr. Abbott defines champerty to be the offense of prosecuting or defending, or agreeing to prosecute or defend, by personal services or furnishing funds, a suit in which one has no interest, upon a corrupt agreement to divide the subject-matter: Abbott's Law Dict., tit. Champerty. Bouvier adopts Blackstone's definition. The feature which distinguishes champerty from other forms of maintenance is, that it involves a division of the subject of litigation. In some of the cases, however, the terms are used interchangeably.

DOCTRINES EXISTED AT COMMON LAW.—It has sometimes been doubted whether the doctrines of champerty and maintenance were known to the common law, or whether they were the creatures of the statutes of Westminster, 1, c. 25; 3 Ed. I; 28 Ed. I, c. 11; 33 Ed. I, and 32 Hen. VIII, c. 9. The better, and the prevailing opinion is, however, that so far as the substance of these offenses is concerned, the statutes referred to were merely declaratory of the common law, and that the fundamental doctrines of the law upon this subject existed before the statutes: Lord Rosslyn in *Willer v. Duke of Portland*, 3 Ves. 494; Tindal, C. J., in *Stanley v. Jones*, 7 Bing. 369; *Peckel v. Watson*, 8 Mees. & W. 691; 4 Bl. Com. 135; Story Eq. Jur., sec. 1048; Parker, C. J., in *Sweett v. Poor*, 11 Mass. 354; *Thurston v. Percival*, 1 Pick. 415; *Backus v. Byron*, 4 Mich. 535; *Boardman v. Thompson*, 25 Iowa, 487; *Martin v. Clark*, 8 R. I. 389; *Weakly v. Hall*, 13 Ohio, 167; *Thompson v. Reynolds*, 73 Ill. 11.

EXISTENCE IN THIS COUNTRY.—As is shown in the principal case the law on the subject of maintenance and champerty has been greatly modified even in England. In this country, where the offenses exist at all, there has been similar and even greater modification of the harsher features of the law, while in some of the states, the whole doctrine is regarded as entirely obsolete. Grier, J., says in *Roberts v. Cook*, 20 How. U. S. 467, that the ancient English doctrines of champerty and maintenance have not found favor in the

United States. These doctrines have no existence in California: *Mathewson v. Fuch*, 22 Cal. 86; *Hoffman v. Vallejo*, 45 Id. 564; *Ballard v. Carr*, 48 Id. 74; *Howard v. Throckmorton*, Id. 482; so in Texas: *Bentick v. Franklin*, 38 Tex. 458, although there is an apparent recognition of their existence in *White v. Gay*, 1 Tex. 384; *McMullen v. Guest*, 6 Id. 275; *Carden v. McDermott*, 12 Id. 553. Redfield, C. J., in *Danforth v. Streeter*, 28 Vt. 490, doubts whether champerty and maintenance are recognized in the law of that state. The existence of these doctrines in Connecticut has never been directly adjudicated upon. It was incidentally referred to in *Stoddart v. Mix*, 14 Conn. 23, and *Bridgeport Bank v. New York, etc. R. R. Co.*, 30 Id. 273. In *Richardson v. Rowland*, 40 Id. 565, the court, however, expressed an opinion that there was nothing in the statute or common law of that state, forbidding maintenance or champerty. These doctrines have no existence, it seems, in Missouri, or, at least, if they do exist, their ancient rigor has been greatly modified, *Duke v. Harper*, 2 Mo. App. 1, where the court say: "The whole doctrine of maintenance and champerty is a relic of a state of things long since passed away." In New York champerty and maintenance exist only as defined and prohibited by statute: *Sedgwick v. Stanton*, 14 N. Y. 289; *Mott v. Small*, 20 Wend. 212. It seems to have been thought, however, by Chancellor Walworth in *Small v. Mott*, 22 Wend. 403, that even in cases for which the statutes did not provide, "agreements actually champertous, as where a stranger to the subject of litigation, who has no interest therein, in law or equity, or in expectancy by the ties of blood or affinity, agrees to assist in embroiling his neighbors in litigation, or in carrying their suits through the different courts after they are commenced, upon a stipulation that he shall receive a share of the fruits of the litigation, as a reward for his mischievous interference" could not be enforced. It was held at an early day in Iowa, in an elaborate opinion by Kinney, J., in *Wright v. Meek*, 3 G. Gr. 472, that these doctrines were wholly unnecessary in this country, and entirely unsuited to the condition of affairs. He said: "In this country, with wise and wholesome laws, enjoying as we do a political and social equality, which never can exist under the institutions of England, with the administration of justice alike accessible to the poor and the rich, where oppression, such as gave rise to the doctrine of maintenance and champerty in England, cannot exist; it is almost impossible to conceive how a case of champerty or maintenance can occur; it is a part of our judicial policy not to shut out suitors, or close the temple of justice against those who resort thither for an adjustment of their legal rights. Neither should litigation be invited, or improperly or unlawfully encouraged, so as to amount to oppression. To check and prevent this, our statutes in relation to malicious prosecutions and limitations of actions have been passed. We have no statute in this state against champerty and maintenance, as they have in New York and some other states of the Union; neither do we see any necessity for adopting the English law on this subject. The state of society which produced them, and the evils which they were intended to remedy do not exist here. To transfer the right of action, or to maintain the suit of another without having any direct or contingent interest in it, will not necessarily produce mischief or oppression in this country. It may, on the other hand, in particular cases, have a tendency to secure rights and promote the ends of justice."

The learned judge also referred to the doctrine of the principal case with approval, and held that in any event there was nothing to prevent a son from maintaining a suit instituted by his father. Speaking of the opinion here pronounced by the chancellor, he said: "In this case the learned chan-

cellor has given an elaborate and able opinion upon this subject, in which the doctrine is, we think, viewed in its proper light." But in *Boardman v. Thompson*, 25 Iowa, 487, Wright, J., delivering the opinion of the court, dissented from the views above expressed by Kinney, J., and held that the doctrine of champerty, as modified by recent decisions, does exist in Iowa: And see *McDonald v. Chicago etc. R. R. Co.*, 29 Iowa, 170.

In many of the states the doctrines of champerty and maintenance still exist in a more or less qualified form. It is so in Alabama: *Holloway v. Lowe*, 7 Port. 488; *Byrd v. Odem*, 9 Ala. 755; *Thompson v. Marshall*, 36 Id. 504. In Arkansas: *Lytle v. State*, 17 Ark. 608; *Fletcher v. Ellis*, 1 Hempst. 300. In Delaware: *Bayard v. McLane*, 3 Harring. 139. In Georgia: *Moses v. Bagley*, 55 Ga. 283; *Meeks v. Dewberry*, 57 Id. 263. In Illinois: *Thompson v. Reynolds*, 73 Ill. 11; limiting *Newkirk v. Cone*, 18 Id. 449. In Indiana: *Scobey v. Ross*, 13 Ind. 117; *Quigley v. Thompson*, 53 Id. 317. In Kentucky: *Rust v. Larue*, 14 Am. Dec. 172; *Brown v. Beauchamp*, 5 T. B. Mon. 413; *Caldwell v. Monroe*, 6 Id. 389; *Davis v. Sharron*, 15 B. Mon. 64. In Massachusetts: *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489. In Michigan: *Backus v. Byron*, 4 Mich. 535. In Mississippi: *Sessions v. Reynolds*, 7 S. & M. 130; *Moody v. Harper*, 38 Miss. 599; *Alexander v. Polk*, 39 Id. 737; but see *Cassedy v. Jackson*, 45 Id. 403. In New Hampshire: *Know v. Martin*, 8 N. H. 157; *Christie v. Sawyer*, 44 Id. 298. In New Jersey: *Whitney v. Kirtland*, 27 N. J. Eq. 333, where the existence of these doctrines seems to be taken for granted. In North Carolina: *Slade v. Rhodes*, 2 Dev. & B. 24; *Martin v. Amos*, 13 Ired. 201; *Barnes v. Strong*, 1 Jones Eq. 100. In Ohio: *Key v. Vattier*, 1 Ohio, 132; *Weakley v. Hall*, 13 Id. 167. In Rhode Island: *Martin v. Clarke*, 8 R. I. 489. In Tennessee: *Hayney v. Coyne*, 10 Heisk. 339, citing and explaining *Weedon v. Wallace*, Meigs, 286; *Webb v. Armstrong*, 5 Humph. 379; *Vincent v. Ashley*, Id. 594. In Wisconsin: *Stearns v. Felker*, 28 Wis. 594; *Allard v. Lamirande*, 29 Id. 502. And in several of the other states as well as in the district of Columbia: *Stanton v. Haskin*, 1 McArthur. 558.

MAINTENANCE BY ONE HAVING INTEREST.—It is a well defined exception to the law against maintenance that where one has a pecuniary interest in a suit, or is related by ties of consanguinity or affinity to either of the parties, he may rightfully assist in the prosecution or defense of such suit, either by furnishing counsel or contributing to the expenses, and may, in order to strengthen his position, purchase the interest of another party, in addition to his own, and that agreements for such maintenance are valid: *Perine v. Dunn*, 3 Johns. Ch. 508; *Call v. Caley*, 13 Met. 362; *Blackerby v. Holton*, 5 Dana, 520; *Thompson v. Marshall*, 36 Ala. 504; *Tilman v. Searcy*, 7 Humph. 347; *Wright v. Meek*, 3 G. Gr. 472. So one may lawfully contribute to the expenses of a criminal prosecution, for every member of the community is in some sense a party to such a suit, and the remedy by action for a malicious prosecution is a sufficient check upon the abuse of this right: *Commonwealth v. Dupuy*, Brightly (Pa.), 44. And so where one honestly believes that he has a personal pecuniary interest in a suit, he may lawfully pay, or agree to pay, a part of the expenses: *McCall v. Capehart*, 20 Ala. 521; *Dorwin v. Smith*, 35 Vt. 69; *Findon v. Parker*, 11 Mees. & W. 675; Story on Cont., sec. 579. But though a son may assist his father in the defense of a suit brought against him, yet if he agree to do so for an interest in the property, it has been held that the agreement will be void for champerty, because he will not be allowed to make a financial speculation out of his filial duty: *Barnes v. Strong*, 1 Jones Eq. 100.

ASSISTING A POOR LITIGANT.—It is another settled exception in the modern doctrine of champerty and maintenance, that one may, in the interest of justice, furnish a poor and oppressed man with money or other proper aid in carrying on a suit or defense to establish or maintain his rights: *Perine v. Dunn*, 3 Johns. Ch. 508; *State v. Chitty*, 1 Bailey (S. C.) 401, per Johnson, J.; *Findon v. Parker*, 11 Mees. & W. 675, per Lord Abinger, C. B. But justice alone must be the end in view, and if the transaction is turned to purposes of speculation by a stipulation for a share of the verdict or judgment, it will be champerty: Johnson, J., in *State v. Chitty*, 1 Bailey (S. C.) 401.

ATTORNEY STIPULATING FOR COMPENSATION OUT OF RECOVERY.—There is much conflict of authority in this country on the point as to whether or not a contract by an attorney or counselor, to receive compensation for his services out of the subject-matter of the suit is champertous. In several of the states it is held that a contract by an attorney for a part of the land or other thing in suit, as his remuneration, in case of success, is affected with champerty and therefore void, without reference to any agreement on his part to pay expenses: *Rust v. Larue*, 14 Am. Dec. 172; *Brown v. Beauchamp*, 5 T. B. Mon. 413; *Davis v. Sharron*, 15 B. Mon. 64; *Holloway v. Lowe*, 7 Port. 488; *Byrd v. Odem*, 9 Ala. 755; *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489; *Scobey v. Ross*, 13 Ind. 117; *Quigley v. Thompson*, 53 Id. 317; *Slade v. Rhodes*, 2 Dev. & B. 24; *Key v. Vattier*, 1 Ohio, 132; *Backus v. Byron*, 4 Mich. 535; *Martin v. Clarke*, 8 R. I. 489. These cases adopt Hawkins' definition of champerty (1 Hawk. P. C. 462, 463), holding that it is not a necessary ingredient in the offense that the champertor should agree to pay the expenses; and they apply the same rule to attorneys as to laymen. In other states, however, Blackstone's definition (4 Bl. Com. 134) is followed, and it is held that an agreement by an attorney for compensation out of the recovery is not champertous, unless he undertakes to bear the expenses of the suit; since, in contributing his services, he does nothing unlawful, that being a part of his professional duty; and since his contracting for a part of the thing recovered is not in itself illegal: *Bayard v. McLane*, 3 Harring. 139; *Newkirk v. Cone*, 18 Ill. 449; *Thompson v. Reynolds*, 73 Id. 11; *Stearns v. Felker*, 28 Wis. 594; *Allard v. Lamirande*, 29 Id. 502; *Moody v. Harper*, 38 Miss. 599; *Duke v. Harper*, 2 Mo. App. 1; *Hayney v. Coyne*, 10 Heisk. 339; *Moses v. Bagley*, 55 Ga. 283; *Meeks v. Dewberry*, 57 Id. 263; *Boardman v. Thompson*, 25 Iowa, 487; *McDonald v. Chicago etc. R. R. Co.*, 29 Id. 170; *Martin v. Amos*, 3 Ired. 201. So in *Wright v. Tebbitts*, 91 U. S. 252, it was held that an agreement by an attorney to prosecute a claim before a commission established by treaty, for a percentage of the amount recovered, was not illegal, immoral, nor against public policy. Of course, in those states in which the doctrine of maintenance and champerty has not been adopted, there is nothing contrary to law, morals, or public policy in a contract by an attorney to recover land or other property for an interest in it, even though he also agree to pay expenses: *Matthewson v. Fitch*, 22 Cal. 86; *Hoffman v. Vallejo*, 45 Id. 564; *Ballard v. Carr*, 48 Id. 74; *Howard v. Throckmorton*, Id. 482; *Bentick v. Franklin*, 38 Tex. 458. And where it is regarded as champertous to stipulate for a portion of the amount recovered as a fee, it is not so considered to contract for a fee equal to a specified per cent. of the amount of the recovery: *Ramsay v. Trent*, 10 B. Mon. 336; *Evans v. Bell*, 6 Dana, 479. And an attorney may not only contribute his services, but advance money to a client without means to enable him to prosecute or defend a suit, relying upon a contract for reimbursement, in case of success, out of the property in litiga-

tion, if such contract is reasonable and fair: *Christie v. Sawyer*, 44 N. H. 298. Contracts by attorneys for remuneration out of the proceeds of litigation are not unlawful in New York, unless made in violation of some of the express provisions of the statute: *Hall v. Gird*, 7 Hill, 586; *Voorhees v. Dorr*, 61 Barb. 580; or unless the service to be rendered is of an unprofessional character, such as secret lobbying: *Sedgwick v. Stanton*, 14 N. Y. 289; *Harris v. Roof*, 10 Barb. 489.

CONTINGENT FEES are not within the rules against champerty and maintenance: *Stanton v. Haskin*, 1 McArthur, 558; *Stanton v. Embrey*, 98 U. S. 548; *Porter v. Parmley*, 39 N. Y. Superior Ct. 219; *Ramsey v. Trent*, 10 B. Mon. 336; *Wilhite v. Roberts*, 4 Dana, 172; *Hickey v. Baird*, 9 Mich. 32; *Marsh v. Holbrook*, 3 Abb. Ct. of App. 176; *Ely v. Cook*, 2 Id. 14; *Stansell v. Lindsay*, 50 Ga. 560; *Newkirk v. Cons*, 18 Ill. 449.

GIFTS AND CONVEYANCES TO ATTORNEYS by their clients pending litigation, particularly of an interest in the suit, are generally examined with great scrutiny, when drawn in question, not only because of the doctrines of champerty and maintenance, but because owing to the confidential relations existing in such cases, and the power possessed by attorneys, there may be danger of oppressive exactions, and courts universally claim the right of strict supervision over the professional conduct of members of the bar: *Welles v. Middleton*, 1 Cox Ch. Ca. 125, per Lord Thurlow; *Morgan v. Higgins*, 1 Gif. 270; *Bibb v. Smith*, 1 Dana, 580; *West v. Raymond*, 21 Ind. 305; *Berrien v. McLane*, 1 Hoff. Ch. 421; *Merritt v. Lambert*, 10 Paige, 352; *Evans v. Ellis*, 5 Denio, 640. But after the litigation is ended an attorney may lawfully contract for remuneration out of the subject of the suit, even where such a contract, if previously made, would be regarded as champertous: *Walker v. Outhbert*, 10 Ala. 218. And in *Lytle v. State*, 17 Ark. 608, it was held that an attorney might lawfully purchase an interest in the suit in consideration of services already rendered, as well as future services.

QUANTUM MERUIT UNDER CHAMPERTOUS CONTRACT.—It has been held in a number of cases that notwithstanding a champertous contract between an attorney and client, the former is nevertheless entitled to a reasonable compensation for his services: *Rust v. Larue*, 14 Am. Dec. 172; *Caldwell v. Shepherd*, 6 T. B. Mon. 389; *Stearns v. Felker*, 28 Wis. 594; particularly for such services as were rendered before the champertous contract was entered into: *Thurston v. Percival*, 1 Pick. 415. But it was held in *Davis v. Sharon*, 15 B. Mon. 64, that an attorney serving under a champertous contract had no lien on the judgment for reasonable compensation against a judgment-creditor of his client.

BUYING AND SELLING DORMANT TITLES, or things in litigation, was a particular form of maintenance against which the statute of 32 Hen. VIII, c. 9, was directed. In many of the states there is no law against such traffic, and there being perfect freedom of alienation one may generally sell and transfer whatever he owns or thinks he owns if there is no fraudulent design in the transaction. It is so in Illinois: *Fetrow v. Merriwether*, 53 Ill. 275. So in Georgia it is held that the statute of Hen. VIII is not in force: *Cain v. Monroe*, 23 Ga. 82; *Harring v. Barwick*, 24 Id. 59; *Webb v. Camp*, 26 Id. 354; though it seems to have been thought otherwise in earlier decisions: *Pitts v. Bullard*, 3 Ga. 17; *Harris v. Cannon*, 6 Id. 888; *Harrison v. Adcock*, 8 Id. 68; *Thompson v. Richards*, 19 Id. 594; *Millsaps v. Johnson*, 22 Id. 105. So in Mississippi: *Sessions v. Reynolds*, 7 S. & M. 130; *Alexander v. Polk*, 39 Miss. 737; *Cassedy v. Jackson*, 45 Id. 397. In some of the states, however, sales

of dormant titles where the land is in the adverse possession of strangers are forbidden either by common or statute law: *Evereden v. Beaumont*, 7 Mass. 76; *Sweet v. Poor*, 11 Id. 549. In New York, at an early day, a statute was enacted prohibiting such sales. But it has been decided that neither the vendor nor vendee was liable upon such a sale, to the penalties of the act, and that the sale was not champertous, unless it was made with a knowledge of the adverse possession: *Hassenfratz v. Kelly*, 13 Johns. 466; *Preston v. Hunt*, 7 Wend. 53; *Etheridge v. Cromwell*, 8 Id. 629. But the vendor will be presumed cognizant of the adverse possession in the absence of proof: *Lane v. Shears*, 1 Wend. 433. A possession without claim or color of title is not adverse so as to forbid a sale by the real owner: *Monnot v. Hutton*, 39 How. Pr. 447; nor where the occupant assents to the sale: *McIntire v. Patton*, 9 Humph. 447. And the prohibition does not apply to judicial sales: *Hoyt v. Thompson*, 5 N. Y. 326; *Frizale v. Leach*, 1 Dana, 216; *Dubois v. Marshall*, 3 Id. 337; *Little v. Bishop*, 9 B. Mon. 240. And the purchaser at such sale may sell and convey without champerty, notwithstanding possession by the debtor: *Snowdon v. McKinney*, 7 B. Mon. 258. Where an infant sold and conveyed, but the vendee did not take possession, it was held that a conveyance to another party by the infant after arriving at age, would not be void for champerty, as he had a right thus to avoid his previous conveyance: *Jackson v. Burchin*, 14 Johns. 124. For other decisions on the subject of sales where the vendor is out of possession, or where the thing is in litigation: See *Jones v. Chiles*, 2 Dana, 25; *Batterton v. Chiles*, 12 B. Mon. 343; *Danforth v. Streeter*, 28 Vt. 490; *Jackson v. Ketchum*, 8 Johns. 484; *Jackson v. Andrews*, 7 Wend. 152; *Rowe v. Beckett*, 30 Ind. 154; *Kellar v. Blanchard*, 21 La. An. 38; *Harman v. Brewster*, 7 Bush. 355.

BARRATRY is the habitual stirring up of quarrels and suits: Abb. Law Dic., tit. Barratry. Lord Coke defines a barrator to be "a common mover and exciter, or maintainer of suits, quarrels, or parts, either in courts or elsewhere, in the country:" Co. Lit. 368 a, b. Hence a single act will not constitute the offense: *Voorhees v. Dorr*, 51 Barb. 580. In *State v. Chitty*, 1 Bailey (S. C.) 379, it was held that a justice of the peace could be indicted as a common barrator for stirring up criminal prosecutions for the purpose of getting fees for dismissing them.

BARKER v. THE PEOPLE.

[3 COWEN, 686.]

CONSTITUTION OF UNITED STATES.—The provision of the constitution of the United States, that "cruel and unusual punishments shall not be inflicted," is a restriction upon the national government only, and does not limit the powers of the state.

ELIGIBILITY TO OFFICE belongs to all persons not excluded by the constitution, and arbitrary exclusions from office can not be established by the legislature, nor can it impose any general qualification which the constitution does not require.

THE POWER TO PROVIDE PUNISHMENTS FOR CRIMES is vested in the legislature not by limited grant or special authority. It is a part of the sovereign power of the state to maintain social order, to define crimes, to ce-

establish a criminal code, and to take life and liberty when necessary, and to produce the end by adequate means.

A JUDGMENT UPON IMPEACHMENT can, by the constitution, extend only to removal from, and disqualification to hold, office. This provision is a limitation and not a grant of power.

RESTRICTIONS ON LEGISLATIVE POWER TO DEFINE CRIMES and to provide for their punishment necessarily exist, though not expressed in special terms; thus, the legislature can not make it criminal to exercise any right guaranteed by the constitution.

ELIGIBILITY TO OFFICE may be taken away from a citizen as a punishment for a crime of which he has been convicted, although the constitution declares that each house of the legislature is the judge of the qualifications of its own members.

DUELING, PUNISHMENT OF.—The legislature has authority to enact that any person convicted of challenging another to fight a duel, etc., "shall be incapable of holding, or being elected to, any post of profit, trust or emolument, civil or military, under this state."

ERROR to the supreme court. The plaintiff in error was convicted on indictment, in the court below, of sending a challenge to one Rogers to fight a duel, under the statute of November 5, 1816, "to suppress dueling;" and the court gave judgment that the plaintiff in error, for said offense, "be incapable of holding, or being elected to, any post of profit, trust or emolument, civil or military, under the state of New York." The plaintiff in error thereupon brought this writ of error to reverse said judgment on the ground that the punishment prescribed by the statute, and imposed upon the plaintiff in error, was inconsistent with the constitution. The nature of the objection sufficiently appears from the opinion.

B. F. Butler, for the plaintiff in error.

Tulcott, Attorney-general, contra.

THE CHANCELLOR. The first section of the act of the fifth of November, 1816, to suppress dueling, prescribes that "the person convicted shall be incapable of holding or being elected to any post of profit, trust or emolument, civil or military, under this state," and the objection now made is, that this punishment is inconsistent with the constitution.

The constitution of the United States provides that cruel and unusual punishments shall not be inflicted. This provision is one of the amendments to that constitution, which were adopted soon after the constitution itself had been ratified. Like other amendments adopted at the same time, it is a restriction upon the government of the United States, intended to deprive that government of a power which it had or might claim, under the

original constitution. In the language which accompanied these amendments, when they were proposed and adopted, "these farther declaratory and restrictive clauses were added to the constitution, in order to prevent misconstruction or abuse of its powers," the solicitude of the people and of the states then was, not to limit the power of the states, but to limit the power of the Union, and by new provisions, to give security to rights which were supposed to be in danger from the new and untried system of national government. The danger apprehended was by the parts from the new government of the whole, and not by any state from its own government. Each state was then at liberty, as it now is, to provide by its own constitution that cruel and unusual punishments shall not be inflicted by its own government. Accordingly, several of the states, in their constitutions established since the adoption of this amendment to the constitution of the Union, have provided that cruel and unusual punishments shall not be inflicted. This provision is found in the constitutions of Ohio, Tennessee, Indiana and Maine. The constitutions of Delaware, Kentucky, Mississippi and Alabama, also established since the adoption of the amendment in question, provide that cruel punishments shall not be inflicted. Other state constitutions are silent upon the subject of punishments, either cruel or unusual. It is most evident that the states which have imposed these restraints upon their own governments, conceived that they were at liberty to do so or not, and that in their conception the constitution of the Union contained no such restraints upon state governments, in the punishment of crimes against states. To consider this amendment as operating upon the several states, would be to render nugatory and null the like provision in the constitutions of very many of the states, and at the same time to force upon all the states which have not adopted such a provision a rule which they may think inexpedient, and which they, at least, have thought unnecessary in their own internal economy. This provision concerning punishments is, therefore, as a part of the constitution of the Union, a restriction upon the government of the Union, and as a part of any state constitution, it is a restriction upon the government of the state which has established it. The constitution of this state imposes no such restriction upon punishments. Without inquiring whether disqualification to hold office is a punishment, either cruel or unusual, I consider this provision of the national constitution inapplicable to offenses against a state.

The constitution of the United States provides that no state

shall pass any bill of attainder, or *ex post facto* law; but that constitution does not regulate the punishment of crimes against a state. In considering the question before us it seem to me to be of little importance, whether we examine it in reference to the late constitution of this state, or by that which now exists. The principles and provisions of both instruments, so far as they concern this question, are nearly the same; but as parts of the existing constitution were in force when this conviction took place, and as it has been urged at the bar, that this judgment is more clearly repugnant to the existing constitution than it may have been to the preceding instrument, I shall inquire whether this judgment is, or is not, repugnant to the constitution now in force.

Eligibility to public trusts is claimed as a constitutional right which can not be abridged or impaired. The constitution establishes and defines the right of suffrage, and gives to the electors and to various authorities the power to confer public trusts. It declares that ministers of religion shall be ineligible to any office; it prescribes in respect to certain offices particular circumstances, without which a person is not eligible to those stations; and it provides that persons holding certain offices shall hold no other public trust. Excepting particular exclusions thus established, the electors and the appointing authorities are by the constitution wholly free to confer public stations upon any person, according to their pleasure. The constitution giving the right of election and the right of appointment, these rights consisting essentially in the freedom of choice, and the constitution also declaring that certain persons are not eligible to office, it follows from these powers and provisions that all other persons are eligible. Eligibility to office is not declared as a right or principle by any express terms of the constitution, but it results as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the constitution. Eligibility to office, therefore, belongs not exclusively or specially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the constitution. I therefore conceive it to be entirely clear that the legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications which the constitution has not required. If, for example, it should be enacted by law that all physicians, or all persons of a particular religious sect, should

be ineligible to public trusts; or that all persons not possessing a certain amount of property should be excluded; or that a member of the assembly must be a freeholder; any such regulation would be an infringement of the constitution; and it would be so, because, should it prevail, it would be in effect an alteration of the constitution itself. But the question before us is not at all of this character. The legislature have made no such general regulation. They have prescribed that incapacity to hold public trusts shall be the punishment of a particular crime; and the question here is, whether they have power to prescribe such an incapacity as a punishment or not.

The power of the legislature in the punishment of crimes is not a special grant, or a limited authority to do any particular thing, or to act in any particular manner. It is a part of "the legislative power of this state," mentioned in the first sentence of the constitution. It is the sovereign power of a state, to maintain social order, by laws for the due punishment of crimes. It is a power to take life and liberty, and all the rights of both when the sacrifice is necessary to the peace, order and safety of the community. This general authority is vested in the legislature, and as it is one of the most ample of their powers, its due exercise is among the highest of their duties. When an offender is imprisoned, he is deprived of the exercise of most of the rights of a citizen; and when he suffers death, all his rights are extinguished. The legislature have power to prescribe imprisonment or death, as the punishment of any offense. The rights of a citizen are thus subject to the power of the state, in the punishment of crimes; and the restrictions of the constitution upon this as upon all the general powers of the government, are that no citizen shall be deprived of his rights, unless by the law of the land or the judgment of his peers, and that no person shall be deprived of life, liberty, or property without due process of law.

The constitution has in one case limited punishment. When an officer of the state is convicted upon impeachment, the judgment can not extend farther than removal from office and disqualification to hold office. This provision stands here a restriction, not an authority. As the punishment is not to extend farther than removal and disqualification, the sense of the terms, and the known course of proceedings in the country from which we derive the history and practice of impeachments, both show that this provision is a mere limitation of a greater power, a power to inflict other punishments, as well as removal and

disqualification. Impeachments of public officers, a peculiar species of accusation, made and tried in a peculiar manner, are to extend no farther in their effect than to discharge an officer from his trust, and to render him incapable of holding office; but if the cause, for which the officer is thus punished, is a public offense, he may be also indicted, tried, and punished, according to law; the constitution leaving the definition of the offense, and its particular punishment, in this case, as in all others, to the general power of the legislature. This part of the constitution, concerning judgment on impeachments, is therefore a limitation of the power of the court for the trial of impeachments, and not a restriction upon the general power of the legislature over crimes.

The power of the state over crimes, is thus committed to the legislature, without a definition of any crime, without a description of any punishment to be adopted, or to be rejected, and without any direction to the legislature concerning punishments. It is then a power to produce the end by adequate means; a power to establish a criminal code, with competent sanctions; a power to define crimes and prescribe punishments by laws, in the discretion of the legislature.

But though no crime is defined in the constitution, and no species of punishment is specially forbidden to the legislature, yet there are numerous regulations of the constitution which must operate as restrictions upon this general power. The whole constitution must be supported; and all its powers and rules must be reconciled into concord. A law which should declare it a crime to exercise any fundamental right of the constitution, as the right of suffrage, or the free exercise of religious worship, would infringe an express rule of the system, and would, therefore, not be within the general power over crimes. Particular punishments would also encroach upon rules and rights established by the constitution. Though the legislature have an undoubted power to prescribe capital punishment and other punishments which produce a disability to enjoy constitutional rights, yet a mere deprivation of rights would, even as a punishment, be, in many cases, repugnant to rules and rights expressly established. Many rights are plainly expressed, and intended to be fundamental and inviolable, in all circumstances. A law enacting that a criminal should, as a punishment for his offense, forfeit the right of trial by jury, would contravene the constitution; and a deprivation of this right could not be allowed in the form of a punishment. Any other right thus

secured, as universal and inviolable, must equally prevail against the general power of the legislature to select and prescribe punishments. These rights are secured to all; to criminals, as well as to others; and a punishment consisting solely in the deprivation of such a right would be an evident infringement of the constitution. Any punishment operating as an infringement of some rule thus expressly established, or some right thus expressly secured, would be unconstitutional; and all punishments which do not subvert such rules and rights of the constitution are within the scope and choice of the legislative power.

But while many rights are consecrated as universal and inviolable, the right of eligibility to office is not so secured. It is not one of the express rules of the constitution, and is not declared as a right, or mentioned in terms as a principle, in any part of the instrument. Important as this right is, it stands as the right to life itself stands, subject to the general power of the legislature over crimes and punishments. As a right flowing from the constitution, it cannot be taken away by any law declaring that classes of men, or even a single person not convicted of a public offense, shall be ineligible to public stations; but as a right not expressly secured by the constitution, it may be taken from convicted criminals when the legislature in their plenary power over crimes, deem such a deprivation a necessary punishment. To say this is to say, in substance, that the right in question may be forfeited by crimes, when the legislature so direct. If this right is taken from none but malefactors, in punishment for offenses declared by law, and ascertained in the due course of justice, the sense of the whole constitution is maintained, and the public, it may be presumed, will not find their choice of agents much abridged by the exclusions from office, which their own legislators, courts and juries may thus add to those specified in the constitution.

Each house of the legislature is the judge of the qualifications of its own members; and it is said that this provision of the constitution is infringed by the disqualification in question. The sense of this provision is that each house shall decide upon the qualifications of its own members without interference or control from any other authority; but this part of the constitution does not define any qualification which shall be allowed or required by either house. The only qualification made requisite by the constitution for a senator is that he shall be a freeholder; and in respect to members of the assembly, no qualification whatever is required by the constitution. Whether the legislature

can exclude from public trusts any person not excluded by the express rules of the constitution, is the question which I have already examined; and, according to my views of that question, there may be an exclusion by law in punishment for crimes, but in no other manner, and for no other cause. If, then, a disqualification for crime is constitutional, each house of the legislature, bound to support the constitution, would give effect to the disqualification. But as the authority of each house is exclusive and supreme, in all questions concerning the qualifications of its own members, if either house should consider such a disqualification unconstitutional, or for any reason whatever should disregard it, the opinion of the house would prevail in respect to the seat and rights of any member declared ineligible by the courts. The disqualification pronounced by the courts would then fail to produce an exclusion from the legislature, but it would, nevertheless, be effectual to exclude from all other public stations. Its effect in respect to all other public employments must be decided by the tribunals of justice. Thus, the same question must, for different objects, receive decisions from different jurisdictions; and under one constitution and one system of laws, the same decision may be expected from all the public authorities. But if the senate or the assembly on one side, and the courts of justice on the other, should make opposite decisions respecting such a disqualification, both decisions would prevail in different respects. The power of each house of the legislature to judge of the qualifications of its own members does not determine or illustrate what is, or is not, a qualification; the statute to suppress dueling does not propose to deprive, nor can any law deprive the several houses of the legislature of their exclusive jurisdiction; and this part of the constitution is, therefore, not infringed by the judgment of disqualification now in question.

It has been strongly urged that the power to prescribe this species of punishment may be abused. That such a power may be abused, can not be denied, since all power intrusted to men is subject to abuse. The power to declare crimes and prescribe punishments is high, indefinite and discretionary; and therefore affords ample room for abuse. Yet the legislature, by their acts, instead of any tendency to severity, show a strong disposition to mildness, in the use of their power over crimes and punishments. That disqualification to hold public trusts will become a frequent punishment seems not probable; the legislature having hitherto adopted this punishment only in the two cases of bribery and duels. But whatever may be the danger

of abuse, the punishment itself is not unconstitutional. The remedy for abuse of the legislative power, in enacting laws which may be unwise, while they are not unconstitutional, is not in the courts of justice. It is found in other parts of the system, in frequent elections and in the due course of the legislative power itself, which alike enacts and repeals laws, in pursuance of public opinion. That this punishment is little consonant to the genius of our institutions; that there is an ample choice of punishments for crimes, without adopting this; that the electors and the appointing powers should enjoy their free choice for public stations, without legal exclusions even for crimes, are reasons of great force; but they are reasons upon which the legislature must decide. •

My opinion upon the whole case is that the punishment of incapacity to hold office, prescribed by the act to suppress dueling, is not inconsistent with the constitution; and that this cause has been rightly determined by the courts through which it has passed.

BOWMAN, BURT, CLARK, DUDLEY, EARLL, GARDINER, HAIGHT, LYNDE, MALLORY, McCALL, McINTYRE, REDFIELD, SUDAM, THORN, WARD, WOOSTER and WRIGHT, Senators, concurred.

OGDEN, Senator, dissented.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

ROSE v. SMITH.

[4 COWEN, 17.]

JURORS.—Circulating spirituous liquors among the jurors, even by the consent of the parties, is a fatal error, for which the judgment must be set aside.

CERTIORARI to reverse a judgment of a justice's court. The writ was founded upon an affidavit charging the jury with misconduct in drinking spirituous liquors during the trial, to which the justice returned that he knew nothing of the fact; whereupon the plaintiff assigned for error that at the trial the jury, without his knowledge, drank spirituous liquor furnished by the defendants, and that one of them was intoxicated. Upon issue at the circuit, the jury found that liquor was circulated among the justice's jury; that one of them was "disguised with liquor;" and that the plaintiff in error objected to the circulation of liquor among them. Motion thereupon for reversal of the judgment.

H. Lathrop, for the plaintiff in error, contended: 1. That the matter was brought before the court in proper form: *Harvey v. Rickett*, 15 Johns. 87; *Brown v. Le Row*, 2 Cow. 525; 2. That sufficient cause was shown for reversal: *Kellogg v. Wilder*, 15 Johns. 455.

J. Brackett, for the defendants in error, insisted that the assignment of error was not supported, it not appearing that the liquor was furnished by the defendants, citing *Bac. Ab., Verdict* (O), pl. 23, 31; 2 *Roll. Ab.* 707, pl. 49; *Smith v. Thompson*, 1 Cow. 221.

By COURT. This matter comes properly before us by an assignment of error in fact, issue, and verdict, upon which the application for judgment should be special. The circulation of spirituous liquors among the jury was, of itself, fatal on error; and we have decided that even consent of parties will not cure it. The matter really to be tried, then, was not whether the circulation of the liquor was procured or consented to by the defendants, but whether such a thing took place for any cause, no matter what. In an inferior court, it is impossible to correct this practice by moving for a new trial, as may be done in a court of record. To avoid the evil of intoxication effectually, it has, therefore, been thought necessary to interfere and set aside the judgment, wherever in error it appears that spirituous liquor has circulated among the jury. The present is a flagrant case. Not only was liquor freely circulated, but one of the jury was, in the language of the verdict, disguised with liquor.

Judgment reversed.

MISCONDUCT OF JURORS IN DRINKING SPIRITUOUS LIQUORS.—See *People v. Douglass*, *post*, and cases cited in the note thereto. See, also, a communication in 21 Alb. L. J. 40, referring to some interesting cases on this point.

THE PEOPLE v. DOUGLASS.

[4 COWEN, 26.]

JURY, MISCONDUCT OF.—The mere separation of a jury, contrary to the direction of the court, is not a sufficient cause for setting aside a verdict; but if, during the progress of the trial of an indictment for murder, two of the jurors separate from their fellows, go to their lodgings, drink spirituous liquors, though not enough to affect them, and one of them converses on the subject of the trial, a new trial must be granted.

THE MERE DRINKING OF SPIRITUOUS LIQUORS by the jurors is enough to set aside the verdict.

CERTIORARI. The defendant having been convicted of murder in the court of oyer and terminer, moved for a new trial on the ground of misconduct of two of the jurors in separating from their fellows during the trial, drinking whisky, etc., and conversing with bystanders about the case. Sentence was thereupon respited, and in order that the opinion of this court might be taken, a certiorari was sued out to bring the case here, and the prisoner was also brought up on habeas corpus. Affidavits were read on behalf of the prisoner from four witnesses, who swore

that on one occasion during the trial, while the jurors were out in charge of an officer, having been instructed by the court to remain together, two of them, Lamb and Swartwout, separated from the others, ate cakes, drank whisky, or other spirituous liquor, and conversed with bystanders about the case. Three of these witnesses were impeached, but no attack was made upon the credit of one of them, Wheeler. Lamb having become insane, no affidavit from him was produced, but Swartwout made an affidavit denying that he drank whisky, or talked about the case while out, and he did not believe that Lamb did, he having been with him all the time, although he admitted having been separated from him five or six rods at one time. Both Lamb and Swartwout were proved to be men of fair character.

Z. A. Leland and J. C. Spencer, for the prisoner, contended, in support of the motion, that the separation of the jury, contrary to the instructions of the court, was, of itself, sufficient to set aside the verdict, particularly in a capital case, much more where it appeared also that they drank spirituous liquors, and they cited *Commonwealth v. McCaul*, Virginia Cases, 271; *Wood v. Hart*, 3 Cai. 96; *Dana v. Roberts*, 1 Root, 134 [1 Am. Dec. 36]; *Orcutt v. Carpenter*, 1 Tyler, 252 [4 Am. Dec. 722]; (Savage, C. J.: "Tyler's reports are not considered good authority even in his own state"); *Tweedy v. Brush*, Kirby, 13; *Thompson v. Mallet*, 2 Bay, 94; *Shepherd v. Baylor*, 2 South. 827; *People v. McKay*, 18 Johns. 218. So, even in civil cases, if there is ground to suspect that the separation has been abused to a party's injury: *Horton v. Horton*, 2 Cow. 589; but see *Smith v. Thompson*, 1 Id. 221, *Hill, Ex parte*, 3 Id. 355.

Talcott, Attorney-general, contra, referred to *State v. Carstaphen*, 2 Hayw. 238; *Bulls v. Drake*, Id. 102; *Clark v. Cole*, 1 Penning. 278; *Crane v. Sayre*, 1 Halst. 110; *Goodright v. McCausland*, 1 Yeates, 372 [1 Am. Dec. 306]; *Duke of Richmond v. Wise*, 1 Vent. 125; Jenk. 4 Cent. 187, Case 84; *Dyer*, 218 a; Co. Lit. 227 b; *King v. Burdett*, 12 Mod. 111; S. C., 2 Salk. 645; 1 Ld. Raym. 148; Bro. Ab., Verdict, pl. 19; *State v. Babcock*, 1 Conn. 401; *King v. Wolf*, 1 Chit. 401.

WOODWORTH, J. The question whether a new trial is to be granted to the prisoner will depend on the facts disclosed by the affidavits, as to the misconduct of the two jurors, Lamb and Swartwout. It is alleged that they separated from their fellows while the jury were out under the charge of the constables, and ate, drank spirituous liquor, and conversed on the subject of

the trial. Anciently, the utmost rigor and strictness were observed in the manner of keeping the jury; and when once charged with a cause, they never could be discharged till they had agreed on their verdict; but the practice has been much relaxed in modern times, in both these particulars. In *Parke's case*, 2 Roll. 85, at *nisi prius*, a juror was challenged and withdrawn, and afterwards went out, mingled with the jury, and stayed with them above half an hour; but the court held that this should not set aside the verdict, unless it was shown that the jury had new evidence given after they went out of court; but it was a misdemeanor in him who was challenged, and punishable.

On looking into the books, we do not find that mere separation of the jury has ever been held a sufficient cause for setting aside a verdict, either in a civil or criminal cause, if we except perhaps the case of the *Commonwealth v. McCaul*, Va. Cas. 271. The question has been learnedly examined in several cases, and especially in that of *The King v. Wolf and others*, 1 Chit. 401. That appears to be a case which excited very great interest, and led to the utmost research of the counsel, and the court of king's bench. It was ably argued, and all the judges delivered their opinions *seriatim*. It was the case of a trial for a conspiracy, which commenced on the morning of the twentieth of April, 1819, at Guildhall, before Abbot, C. J., and continued till eleven at night, when the evidence being closed on the part of the prosecution, but the case being unfinished, the court informed the jury they might retire to their families; but especially warned them not to have any communication with any person concerning the matter in issue. They retired accordingly, and the next morning assembled, heard the case through, and at a late hour in the afternoon found the defendants guilty. No abuse being pretended, the naked question was presented, whether a separation *per se* was a sufficient ground for avoiding the verdict; and it was held, after great deliberation, that it was not.

The court admitted the ancient strictness which prevailed in this respect, but said it had been much relaxed; that it frequently became necessary from the very great length of modern trials that the jury should separate; that from the mere fatigue and exhaustion which jurors frequently undergo, it is a course not only essential to the rights of the public, but of mercy to defendants, whose causes must be unsafe in the hands of a jury entirely shut out from comfortable refreshment and relaxation,

perhaps for several days. Best, J., in particular, speaks of the same rule being applicable to trials for the highest criminal offenses. "Suppose," says he, "in the case of a trial for capital felony, some of the jury, by accident, get out of the box, and the prisoner in the result of the trial is acquitted; the consequence of the argument for the prisoners would be a mis-trial, and the man must be put on his trial again:" 1 Chit. 426. What the King's bench would have said of a capital case, it is true, does not directly appear; because the case under consideration was one of a misdemeanor. But the reasoning of the judges is equally applicable to both cases; and we think that the mere fact of separation, unaccompanied with abuse, should not avoid the verdict, even in a capital case. A decision was cited to this effect from Connecticut, but we do not rely upon that because the latitude allowed to jurors, in all respects, is there very great, and their courts do not profess to be guided in this practice by the rules of the common law. The decisions in this country are not uniform. Several cases were cited on the argument from the New Jersey reports, in which the separation of the jury was held irregular, but not sufficient to vitiate the verdict. These cases were not capital, but they go strongly to support the general principle. *State v. Carstaphen*, 2 Hayw. 238, was a criminal case, and the same doctrine was holden. The case of the *Commonwealth v. McCaul*, Va. Cas. 271; does, however, go the length of saying that the court should guard against the possibility of abuse, by setting aside the verdict if any of the jury depart from the control of the officer; but the court did not profess to go upon any adjudged case in England; and we think the English cases are founded on the better reason. These are uniform, that though the jury separate, if there be no farther abuse, this shall not vitiate the verdict, though it would be a contempt of the court, if contrary to their instructions, and would be punishable as such.

In the case at bar, the jury retired before the trial had closed, under the care of two sworn constables, and it is alleged, on the part of the prisoner, that two of them not only separated from their fellows, but also drank whisky, and conversed freely on the subject of the trial. Three of the witnesses, through whom it is sought to fix on Lamb and Swartwout the charge of having drank whisky and conversed on the matter in issue, having deliberately contradicted what they had sworn as to conversations, I think they should not receive credit even for what they say in relation to the drinking of these jurors. Their

testimony properly comes within the maxim, *falsus in uno, falsus in omnibus*. Besides one of them is shown to have been a notorious drunkard himself. He was in a state of intoxication during most of the session, and at the very time when he pretends to have heard and seen things implicating the two jurors. But the case is very different with Wheeler, who thinks he saw both Swartwout and Lamb drink some kind of spirituous liquor while out. This witness stands unimpeached, and the exculpatory affidavit of Swartwout, one of the jurors, is not explicit. He confines himself to a literal denial that he drank whisky, but Wheeler's affidavit that he drank some kind of spirits may still be correct.

Admitting, however, that the weight of evidence is against drinking, admitting that Wheeler's and Swartwout's affidavits can not be reconciled, I think that in a case of life and death the question upon the misbehavior of the jury should be beyond all doubt. Clearly we should disregard the fact of eating as forming any ground for setting aside the verdict, for though this might be a contempt of court, being without their leave, yet an opportunity to take reasonable refreshments would always be granted at a proper season, and the circumstance of their being obtained somewhat irregularly could not prejudice the prisoner; but here the doubt is, whether there was not farther abuse in drinking spirituous liquors. This should not be tolerated in any shape in the jury, during the progress of the trial, and we have uniformly held that it vitiated the verdict in a civil cause, even where the liquor was given to the jury by consent. It will not do to weigh and examine the quantity which may have been taken by the jury, nor the effect produced. In this case, it is not at all probable that either of these jurors was, in the least, under the influence of strong drink; but, being doubtful whether they may not have drank something, we ought not, especially in a case of life and death, to sustain the verdict.

We can not lay down any general rule for all cases like this which may arise. They will be attended with different circumstances. We do mean to be understood, however, as saying that the mere separation of the jury without any farther abuse, is not sufficient ground for setting aside a verdict, though it may deserve severe reprehension from the court. In this case, we think there is not a total failure of proof that the two jurors drank, though, perhaps, the balance of evidence may be against it.

SUTHERLAND, J. I concur in the result of the opinion delivered. I do not think the evidence before us is to be weighed and balanced with the same nicety as would be proper in a civil cause. All we have to do in a case like the present, is to inquire whether, in the conduct of the jury, that prudence and circumspection has been observed which becomes them on so solemn an occasion as that which commits to their hands the life of a fellow being. There is no difference among us that the mere fact of drinking spirituous liquor is enough to set aside the verdict. It will never do to hold a rule short of this, that where any one of the jury, in the course of the trial, drinks spirituous liquor, we will set aside the verdict on this ground alone. In this case, I think there is little doubt that two of the jurors did drink, though probably not in such quantities as in the least to disqualify them for a discharge of their duty. Here are four witnesses who concur in the fact that the two jurors drank, and none of them have ever contradicted themselves as to this fact in any subsequent conversation, though three of them have given statements at war with their affidavits, in other respects. Swartwout contents himself with denying that he drank whisky; but does not, and indeed, could not in truth, deny this of his co-juror Lamb, though he might, if true, have done so with the same propriety that he denies Lamb's holding conversation with any one on the subject of the trial. As to the latter, he could not speak with absolute certainty. At one time he was six rods from Lamb, when he might have conversed unheard by Swartwout, though, if during the time of their separation he had his eye upon Lamb, he might have negated the fact of his drinking. He has not even gone so far as to say that he did not see Lamb drink. Though three of these witnesses have, subsequent to their making affidavits in behalf of the prisoner, contradicted themselves in relation to some of the material facts to which they swore, I do not think that, on this summary application addressed to the court, we are warranted in utterly rejecting their testimony upon the maxim, *falsus in uno, falsus in omnibus*. It is enough that we are brought to entertain a reasonable doubt upon the facts in question. It is not like the case of a civil trial, or indeed of any trial where witnesses may be compelled to attend and undergo a cross-examination; but on the whole, I think the evidence conclusive that the jurors, whose conduct is in question, or one of them, did drink spirituous liquor of some kind.

As remarked by Mr. Justice Woodworth, it is impossible to

lay down any general rule which shall guide in all the various circumstances with which cases like this may be attended; yet I have no hesitation in saying that where the separation of a jury is contrary to their duty towards the court, and there is the slightest suspicion of abuse, their verdict should be set aside. The separation here was unusual and unwarrantable. It was perfectly proper for this jury to go out under the care of the constables, and a jury can not, in such a case, be always immediately under the eyes of the officers. The purpose is plain for which they were suffered to leave the box. It was not for the purpose of going to their meals; and they received from the court, the usual strict charge as to their demeanor. Yet they departed entirely from the care of the officer, and the instructions they had received, and went a distance of thirty rods to their lodgings. This was not necessary. It was improper, and I think a separation under these circumstances, in itself, enters with great weight into the cause for granting a new trial, in which we are unanimous.

SAVAGE, C. J. I concur in the opinion that a new trial should be granted; and, without recapitulating the evidence, would merely observe, that, in a civil suit at this day, it is perfectly clear that a separation of the jury without, and even contrary to the direction of the court, could not, of itself, warrant us in setting aside their verdict. The ancient strictness in this respect has been much relaxed, as will be seen by the uniform current of modern decisions. Yet upon so grave a question as that of the life or death of a fellow citizen, I am not prepared to say that the separation of the jury, contrary to the instructions of the court, and mingling with the throng about the court-house, should not affect their verdict. But I do not deem it necessary for me to express an opinion upon this point, because I think it abundantly proved that these two jurors not only separated from their fellows, and ate and took cakes with them on their return, but that they also drank whisky. That Lamb also conversed on the subject of the matter in issue, is not fully negatived by Swartwout. He admits that he heard Lamb in conversation on the steps of the jail; he does not know on what subject, but another witness tells us that it related to the trial. This was while Swartwout was at a distance of five or six rods from Lamb, on the way to the court-house. It is true that the witness who speaks to that conversation and renders details has given a different history; but his affidavit is somewhat con-

firmed by the circumstances stated in Swartwout's affidavit. I think I am warranted, from the proof, in adding to the other misconduct of these jurors, that conversation was held by some bystander, at least with Lamb, upon the subject which he was engaged in trying. It has been properly observed that there is very great difficulty in laying down a general rule which shall govern in these cases. But I am willing to say, that in no case, where it appears that any of the jury separate from their fellows contrary to the direction of the court, make use of strong drink, and converse upon the matter which they are impaneled to try, would it be safe to sanction their verdict. The prisoner must be remanded to the county of Steuben, and a new trial had at the next court of oyer and terminer in that county.

Rule accordingly.

MISCONDUCT OF JURORS.—On this subject, see *Ross v. Smith*, ante, 331, and *Goodright v. McCausland*, 1 Am. Dec. 306. To the point, that mere separation of the jury without the consent of the court, or any similar irregularity not attended by any reasonable suspicion of injury, will not vitiate the verdict; the principal case is cited in *Douglass v. Tousey*, 2 Wend. 355; *People v. Ransom*, 7 Id. 423; *People v. Carnal*, 1 Park. Cr. 260; *Anthony v. Smith*, 4 Bosw. 510; *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. 11. The doctrine was denied by Selden, J., in *Eastwood v. People*, 3 Park. Cr. 43, where it was said to rest on mere dicta of the majority of the judges in *People v. Douglass*, and to be in direct conflict with *People v. McKay*, 18 Johns. 212. This opinion of Selden, J., was itself denied in *Stephens v. People*, 4 Park. Cr. 503; S. C., 19 N. Y. 560, and the doctrine of the principal case recognized as sound. In *Brant v. Fowler*, 7 Cow. 563, it was decided chiefly on the authority of *People v. Douglass*, that the verdict must be set aside where it appeared that one of the jurors drank a small quantity of spirituous liquors, as he said, to check a diarrhea. That decision was denied in *Wilson v. Abrahams*, 1 Hill, 211, where it was held that in civil cases, at least, neither the separation of the jury nor the drinking of spirituous liquor by some of the jurors, would be necessarily fatal to the verdict, particularly where the alleged misconduct was not in violation of the express directions of the court; and it was claimed that there was nothing to the contrary in the opinions of the judges in *People v. Douglass*.

OTHER CITATIONS OF THE PRINCIPAL CASE are: as to the proper practice where a new trial on the merits is sought, after a conviction of felony in a court of oyer and terminer: *Quimbo Appo v. People*, 20 N. Y. 552; that a witness false in one thing is false in all: *People v. Evans*, 40 N. Y. 5.

VAN ANTWERP v. NEWMAN.

[4 COWEN, 82.]

WRIT OF ERROR is a writ of right, and need not be allowed by a judge; filing it with the clerk and entering its receipt is a sufficient allowance.

STAY OF EXECUTION results from filing writ of error with the clerk, if bail be in.

NO PARTICULAR FORM OF RECOGNIZANCE of bail in error is necessary.

MOTION for leave to issue execution upon a judgment for the plaintiff, in this court, (2 Cow. 543), notwithstanding a writ of error sued out by the defendant, because the writ of error was not properly allowed, because the recognizance was defective in not being acknowledged and in describing a judgment of the mayor's court rather than of this court, and because of delay in returning the writ of error. The recognizance was in the form of a bond to the plaintiff in the sum of twenty-three dollars and fifty cents, executed by the defendant, with two sureties, conditioned to be void if the defendant should prosecute to effect the writ of error brought in the court for the trial of impeachments and correction of errors against the plaintiff "upon a judgment in our mayor's court of the city of Albany, and which was reversed by our said supreme court," and pay all costs adjudged upon the judgment of the supreme court if it should be affirmed, and all costs and damages awarded for delay. Added to the bond was the following: "Signed, sealed and delivered in the presence of John Woodworth." "I approve of the above persons as sufficient sureties for the prosecution of the writ of error in the within mentioned cause. March 30, 1824. John Woodworth." The writ of error was in the usual form, tested March 20, 1824, and filed with the clerk of this court April 10, 1824, and notice given to the plaintiff's attorney on the same day. The writ was issued and filed without being allowed by a judge and had not been returned.

L'Amoureux, for the motion.

L. H. Palmer, contra.

By Court. The mere delay in this case is not a sufficient ground for our allowing execution to go. It is not necessary that a writ of error should be allowed by a judge. It is a writ of right; and the proper officer is bound to issue it, of course, on the application of the party. The English books speak much of allowing a writ of error, but this does not mean a judicial act. There, the writ is delivered to the clerk of the

errors, who enters its receipt, whereupon the party takes of him a note or certificate that he has allowed the writ. This is what the books mean when they speak of allowance. With us, the English idea of allowance of the writ is seldom complied with, beyond the receipt of it by the clerk of the court to which it is directed. The filing it with him, and his entering the receipt of it, is an allowance, and stays execution, if bail be in.

As to the recognizance, the party here drew a bond, with an adequate penalty and a proper condition. With this he goes to a judge, in whose presence it is executed. The judge witnesses it, and certifies substantially that it was acknowledged in his presence. The proceeding was somewhat informal. The instrument is not technically worded; but it was a virtual compliance with the act. The words "signed, sealed and delivered in the presence of" the judge, is equivalent to saying that it was acknowledged before him. It was, in fact, so acknowledged. It was the act of the party and his bail. It is a sufficient warrant for drawing up a regular recognizance roll, and we think it fully available to the plaintiff, should he find it necessary to resort to it by action.

Motion denied.

ROSS v. LUTHER.

[4 COWEN, 153.]

COMMENCEMENT OF SUIT.—The issuing the writ is the commencement of the action.

ISSUING WRIT.—The mere filling up of a writ is not sufficient; it must be either delivered to the sheriff, or sent to him by mail or otherwise, with a *bona fide*, absolute, unequivocal intention to have it served. If delivered to an agent or messenger who has power to determine when or whether it shall be given to the sheriff, the writ is not deemed issued, nor the suit commenced, until the actual delivery of the writ to the officer.

EXECUTION WRONGLY TESTED as to the name of the chief justice, is not void; but is amendable, and the sheriff can not avail himself of the irregularity.

DEBT against the defendant as sheriff, for the escape of one Wait, a prisoner on *ca. sa.*, from the jail limits. It appeared that the *ca. sa.* was wrongly tested in the name of Kent, C. J. But the principal controversy was as to whether the prisoner was off the limits at the commencement of the suit. One Skinner, clerk to the plaintiff's attorney, testified that the *apias ad respondendum* in this action had been filled out some

time before it was delivered to the coroner for execution, and was left with him to be issued whenever it should be ascertained that Wait was off the limits; that on the evening of the day when the writ was delivered, he took it and went out of the office with the intention of delivering it to the coroner if he should find that Wait was out, but not otherwise; that, becoming satisfied about nine o'clock that Wait had escaped, he made up his mind to deliver the writ to the coroner; that, having found him, he delivered the writ to him; and that he then went immediately, and as rapidly as possible, to a tavern two miles and a half from the jail limits, and found Wait there. Some other evidence was introduced as to the exact time when Wait was off the limits. The judge charged the jury that the action must be deemed commenced when Skinner started to deliver the writ to the coroner after determining absolutely to deliver it; and that if they should find that Wait was then off the limits, their verdict should be for the plaintiff; otherwise not. Verdict for the defendant, and motion for new trial.

J. Edwards and S. A. Foot, for the motion, contended that the action was not to be deemed commenced until the writ was actually delivered to the coroner; that the mere intention of Skinner, the plaintiff's agent, could not determine the matter; and that the case was in this respect clearly distinguishable from *Bronson v. Earl*, 17 Johns. 63; *Burdick v. Green*, 18 Id. 14; *Vischer v. Gansevoort*, Id. 496.

J. A. Collier, contra, cited *Filkins v. Brockway*, 19 Johns. 170; and *People v. Singer*, 1 Cow. 47, as authorities for the position that the filling up of the process should be deemed the commencement of the action.

WOODWORTH, J. The judge charged the jury that the suit must be considered as commenced when Skinner started to deliver the writ to the coroner, after he had determined absolutely to issue it, and not from the time when he first took it from the office without any certain intention of delivering it. If the law was correctly laid down, there is no ground for disturbing the verdict on the question of fact. From the evidence, it is somewhat doubtful whether Wait was out of the limits when the agent determined to deliver the writ, and went in pursuit of the officer.

The delivery of a writ to the wife of a coroner is a sufficient commencement of an action against the sheriff: *Bronson v. Earl*, 17 Johns. 63. In that case, however, it appeared that the

writ was put into the hands of a person to be delivered to the coroner, to be served at such time as the prisoner should be found to have left the jail limits. There was no evidence of an absolute intention to deliver the writ before the time of its actual delivery, so that the question in this cause did not come under consideration. In *Burdick v. Green*, 18 Johns. 14, it was held that the issuing of the writ is the commencement of the suit, in all cases where the time is material; as, to save the statute of limitations. By this general proposition it is not intended that the mere filling up of the process is such commencement. The same case explains the rule that it is not necessary to show the writ was actually delivered to the sheriff; but it is sufficient if it appear that the writ was made out and sent to the sheriff or his deputy, by mail or otherwise, with a *bona fide*, absolute and unequivocal intention of having it served. The same doctrine is recognized in *Vischer v. Gansevoort*, 18 Johns. 496. These cases decide the law applicable to the case under consideration.

Skinner testified that he was clerk in the office of the plaintiff's attorney; that the writ had been filled up some time previous, and left with him to be issued when he could ascertain that Wait was off the limits. There was not, then, an absolute intention that the writ should be delivered to the coroner in the first instance. It was committed to Skinner to exercise his discretion; he became satisfied about nine o'clock that Wait was off the limits; and then made up his mind to deliver it to the coroner, which was done a half hour afterwards. Skinner was merely an agent or messenger, with power from the plaintiff to decide on the time when to deliver the writ. It does not appear that he had any other authority. It was not competent, therefore, for him to decide from what time the suit should be considered as commenced. In *Vischer v. Gansevoort*, it was decided that the messenger or bearer of the writ has not the power to decide whether the suit shall be commenced by any event, subsequent to the delivery of the writ to him, short of its being actually put into the hands or left at the office of the coroner. It follows then, conclusively, that the determination of Skinner to deliver the writ absolutely is of no avail; and the suit was not commenced until the actual delivery to the coroner.

The judge, therefore, erred in supposing that the decision of Skinner to deliver the writ was the test. He ought to have charged the jury that, on the facts, the suit was not commenced in judgment of law until the coroner received the writ. The

consequence is that the plaintiff is entitled to a new trial, with costs, to abide the event.

SUTHERLAND, J. The suit cannot be considered as having been commenced until the actual delivery of the writ to the coroner. When the witness, Skinner, who was the clerk of the plaintiff's attorney, left the office with the writ, he had no absolute intention of delivering it to the coroner. He states that he took it with an intention of delivering it to the coroner, if he could be satisfied Wait was off the limits, but not otherwise. That afterwards he made up his mind to deliver it to the coroner, as he learned sufficient to satisfy him he ought to issue the writ; and he went immediately in pursuit of the coroner for the purpose of delivering it to him, but it was about half an hour before he found him.

The clerk is to be considered as the agent or messenger of the attorney, and as acting in obedience to his orders when he took the writ and left the office with it. That his instructions had been given to him at some previous time, and not at the precise moment when he left the office, can not vary the case. He left the office, then, with instructions to deliver the writ, if Wait was beyond the limits. This case is, then, precisely within that of *Vischer v. Gunsevoort*, in which the court say: "When the attorney issued the writ, the intention to commence the suit was not absolute, positive and unequivocal; and we can not admit that the messenger or bearer of the writ shall have it in his power to decide whether the suit shall be commenced by any event subsequent to the delivery of the writ to him, short of its being actually put into the hands, or left at the office of the coroner."

The judge, therefore, erred in charging the jury that the suit must be considered as commenced "when the clerk started to deliver the writ to the coroner, after he had determined absolutely to issue it."

The execution having been tested in the name of Chief Justice Kent, instead of Chief Justice Thompson, did not render it void. It was amendable, and the sheriff could not avail himself of the irregularity.

SAVAGE, C. J., concurred.

New trial granted, with costs to abide the event.

COMMENCEMENT OF ACTION, ISSUANCE OF WRIT IS GENERALLY.—It is undoubtedly the general rule in the United States, except where it has been otherwise provided by statute, that an action is deemed commenced, so far

as the parties to it are concerned, from the time that the summons, or other process, is issued and delivered, or put in course of delivery to the officer, with a *bona fide* intent to have it served. This was the settled rule in New York, until it was changed by the revised statutes: *Bird v. Caritat*, 3 Am. Dec. 433; *Cheetham v. Lewis*, 3 Johns. 42; *Fowler v. Sharp*, 15 Id. 323; *Hogan v. Cuyler*, 8 Cow. 203; *Koon v. Greenman*, 7 Wend. 124; *Jackson v. Brooks*, 14 Id. 654, citing and approving the principal case. But after the enactment of the revised statutes (2 R. S. 347, sec. 1), the action was not deemed commenced until the writ was actually served, as in the case of a *capias ad respondendum* issued against a sheriff for an escape: *Carruth v. Church*, 6 Barb. 505. So, where a set-off was pleaded, which was acquired by the defendant after the issuance of the writ, but before service: *Johnson v. Comstock*, 6 Hill 10. So, to avoid the bar of the statute of limitations: *Edmondstone v. Thomson*, 15 Wend. 554. And under the code, the action is deemed commenced for most purposes only by the actual service of the summons: *Treadwell v. Lawlor*, 15 How. Pr. 9; *Wiggin v. Orser*, 5 Duer, 118; *Haynes v. Onderdonk*, 5 Thomp. & C. (N. Y. Superior Ct.), 176; S. C., 2 Hun, 619; Bliss's Annot. N. Y. Code, secs. 398, 416. Under the statute of limitations, however, an attempt to commence the action by issuing the summons, and delivering it to the officer *bona fide* for service, is equivalent to its actual commencement: *Wiggin v. Orser*, 5 Duer, 118; Bliss's Annot. N. Y. Code, sec. 399; provided such attempt is followed by actual service within the time specified in the code, sec. 399. It was held, also, in *Gregory v. Weiner*, 1 Code Rep. N. S. 210, that for the purpose of issuing a warrant under the non-imprisonment act, the action would be deemed commenced from the delivery of the summons to the sheriff, with intent to have it served. Previously, in *Lee v. Averell*, 1 Sandf. 731, it had been held, on the other hand, that the action would be deemed commenced for the purpose of issuing such a warrant only from the actual service of the summons. When a provisional remedy, such as an attachment, is allowed, the action is deemed commenced, for the purpose of giving the court jurisdiction, from the time of granting such remedy, but this jurisdiction is merely conditional: Bliss's Annot. N. Y. Code, sec. 416; *More v. Thayer*, 10 Barb. 258; *Treadwell v. Lawlor*, 15 How. Pr. 8. In cases of publication of summons, the action is deemed commenced from the expiration of the period of publication: *More v. Thayer*, 10 Barb. 258; *Abrahams v. Mitchell*, 8 Abb. Pr. 123; *Tomlinson v. Van Vechten*, 1 Code Rep. N. S. 317; *see contra*, *Dykens v. Woodward*, 7 How. Pr. 313.

Other states in which the suing out of the writ with intent to have it served, has been held to be the commencement of the action, are the following: Alabama: *Cox v. Cooper*, 3 Ala. 256. Arkansas: *Fowler v. Byrd*, 1 Hempst. 213; and the mere filing of the declaration is not the commencement of the action: *State Bank v. Cason*, 10 Ark. (5 Eng.) 479. Illinois: *Feazle v. Simpson*, 1 Scam. 30. Indiana: *Clark v. Redman*, 1 Blackf. 379. *Underwood v. Takham*, 1 Ind. 276. And the mere filing of the declaration without issuing any writ is not such a commencement of the action as to stop the running of the statute of limitations: *State v. Clark*, 7 Ind. 468. And it was held in *Hancock v. Ritchie*, 11 Id. 53, that where in a proceeding by foreign attachment the writ was made out, but not served, or delivered to the sheriff for service, and the defendant subsequently appeared, and pleaded an assignment of the cause of action by the plaintiff after the date of the writ, the action should be deemed commenced only from the time of such appearance. The court there cited and approved the doctrine of the principal case on the point, that actual or constructive delivery of the writ

to the sheriff is necessary to make its issuance the commencement of the action.

In Kentucky, also, "the suing out process has always been held the commencement of an action or suit:" *Prindell v. Maydwell*, 7 B. Mon. 314; *Thompson v. Bell*, 6 T. B. Mon. 559; *Lyle v. Bradford*, 7 Id. 111. The same rule has been held to prevail in Maine: *Johnson v. Farwell*, 7 Greenl. 370. So in Massachusetts the doctrine is that the action is commenced by issuing the writ and delivering it to the sheriff with intent to have it served: *Ford v. Phillips*, 1 Pick. 202; *Gardner v. Webber*, 17 Id. 407; *Butler v. Kimball*, 5 Met. 94; *Bunker v. Shed*, 8 Id. 150; *Wheatland v. Lovering*, 10 Gray, 16; *Estes v. Tower*, 102 Mass. 65. But where the writ is made provisionally and delivered to the officer with instructions not to serve it until demand has been made upon the defendant, or notice given, or some other act has been done, the commencement of the action will date from the actual service of the writ: *Seaver v. Lincoln*, 21 Pick. 267; *Grimes v. Briggs*, 110 Mass. 446. The rule in that state seems to be that the action may be held to be commenced at any time after the issuance of the writ which may be deemed most conducive to justice: *Badger v. Phinney*, 8 Am. Dec. 105. The date of the writ is not conclusive evidence of the commencement of the action. Hence, where at the date of the writ the cause of action had not accrued, but it had accrued before service was begun, it was held that the latter should be considered the time of the commencement of the action, in accordance with the maxim, *ut res magis valeat quam pereat*: *Federhen v. Smith*, 3 Allen, 119. In *Swift v. Crocker*, 21 Pick. 241, the action was held to be commenced by an attachment levied upon realty.

In New Hampshire, also, it seems that the suing out of the writ with intent to have it served has been held to be the commencement of the action: *Society v. Whitcomb*, 2 N. H. 227. See, also, *Parker v. Colcord*, Id. 36. So in New Jersey, Ohio, and Pennsylvania: *Whitaker v. Turnbull*, 18 N. J. L. (3 Harr.) 172; *Swisher v. Swisher*, Wright, 755; *Caldwell v. Heitsch*, 9 Watts & S. 51. So in Iowa under the code of 1851, sec. 1663, *Reed v. Chubb*, 9 Iowa, 178; *Elliott v. Stevens*, 10 Id. 418. But for the purpose of issuing an attachment it was held in *Hagan v. Burch*, 8 Iowa, 309, that the action might be deemed commenced by the filing of the petition or declaration. In California, it is, and has been since 1850, the established law that an action is deemed commenced within the meaning of the statute of limitations, from the filing of the complaint: Code of Civ. Proc. sec. 350; *Sharp v. Maguire*, 19 Cal. 577; *Pimental v. San Francisco*, 21 Id. 351; *Allen v. Marshall*, 34 Id. 166; *Adams v. Patterson*, 35 Id. 122. For all other purposes an action is commenced by filing the complaint and issuing summons or by the defendant's voluntary appearance: Code of Civ. Proc. sec. 405; *Sharp v. Maguire*, 19 Cal. 577; *Dupuy v. Shear*, 29 Id. 239; *Green v. Jackson Water Co.*, 10 Id. 375; *Flandreau v. White*, 18 Id. 640.

A DIFFERENT DOCTRINE PREVAILS IN SOME STATES, as in Connecticut and Vermont. In the former state it has been repeatedly decided that the service, and not the issuance, of the writ is the commencement of the action: *Clark v. Helms*, 1 Root, 486; *Jencks v. Phelps*, 4 Com. 149; *Spalding v. Butts*, 6 Id. 28; *Gates v. Bushnell*, 9 Id. 530. In Vermont it is settled that for all purposes, except to avoid the bar of the statute of limitations, an action is deemed commenced only from the service of the writ: *Downer v. Garland*, 21 Vt. 362; *Kirby v. Jackson*, 42 Id. 552. But to save a claim from the bar of the statute of limitations an action will be deemed commenced from the taking out of the writ: *Allen v. Mann*, 1 D. Chip. 94; *Day v. Lamb*, 7 Vt. 426.

In most of the states this matter is probably now regulated by express statute; but, as will be seen from the decisions above cited, in the absence of any such statute, the general practice of the American courts on this point is in accordance with the doctrine of the principal case. The rule in the courts of king's bench and common pleas was different: *Johnson v. Farwell*, 7 Greenl. 370.

DATE OF WRIT, PRIMA FACIE EVIDENCE.—Where the issuance of the writ is regarded as the commencement of the action, its date will be deemed *prima facie* evidence of the time of its issuance: *Day v. Lamb*, 7 Vt. 426; *Johnson v. Farwell*, 7 Greenl. 370; *Lyle v. Bradford*, 7 T. B. Mon. 111; *Gardner v. Webber*, 17 Pick. 407; *Bunker v. Shed*, 8 Met. 150; *Federhen v. Smith*, 3 Allen, 119.

CHANCERY SUIT, WHEN PENDING AS TO STRANGERS.—The rule in chancery under the ancient practice was that a suit was deemed commenced as between the parties and their privies from the time of the issuance of the subpoena and its service, or a *bona fide* attempt to serve it: *Hayden v. Bucklin*, 9 Paige, 512; *Fitch v. Smith*, 10 Id. 9; *Webb v. Pell*, 1 Id. 564; *Weed v. Smutt*, 3 Sand. Ch. 273; but the suit was not deemed pending so as to constitute notice to strangers until the subpoena was actually served: *Murray v. Ballou*, 1 Johns. 576; *Hayden v. Bucklin*, 9 Paige, 512; *Miller v. Kershaw*, 1 Bailey Eq. 479; *Lyle v. Bradford*, 7 T. B. Mon. 111; *Dunn v. Games*, 1 McLean, 321.

IRREGULARITY IN ISSUING EXECUTION.—That only the defendant in execution can take advantage of an irregularity committed in issuing it before or after the time prescribed by statute, when an execution may properly issue; see *Pierce v. Alsop*, 3 Barb. Ch. 190; *Bacon v. Cropsey*, 7 N. Y. 199, approving the principal case; and as to the power of a court to correct mere formal irregularities in the date of an execution, etc., see *Park v. Church*, 5 How. Pr. 383, S. C., 1 Code Rep. N. S. 49, citing the principal case.

JACKSON v. LOOMIS.

[4 COWEN, 168.]

IMPROVEMENTS.—The value of permanent improvements made by an occupant under a *bona fide* purchase may be allowed in an action for mesne profits, to the extent of the rents and profits due to plaintiff.

TRESPASS for mesne profits. The plaintiff proved his recovery of the premises in ejectment, under which he was put in possession, and their annual value since the date of the demise. The defendant then offered evidence to prove that he entered into possession as a *bona fide* purchaser for a valuable consideration from one Wells, the reputed owner, who had long been in possession; that he, the defendant, continued in peaceable and undisturbed possession until February 2, 1818, when the plaintiff's lessor brought ejectment, claiming by virtue of a sale under a mortgage from Wells prior to the defendant's purchase; that he, the defendant, resisted the claim until a final decision

against him by the court of errors; that from February 2, 1818, to the date of the decision, he had made valuable and lasting improvements, by digging and gathering stones from the soil, and building stone walls or fences around the premises, etc., which improvements exceeded the value of the annual income from February 2, 1818, until possession was delivered. The judge who presided refused to admit this evidence, either to defeat a recovery by the plaintiff, or in mitigation of damages. Verdict for the plaintiff for two hundred and eighty-seven dollars damages. Motion for a new trial, based on exceptions to the opinion of the court.

J. L. Wendell, for the motion, cited *Murray v. Gouverneur*, 2 Johns. Cas. 441 [1 Am. Dec. 177]; *Moore v. Cable*, 1 Johns. Ch. 387.

R. Weston, *contra*.

By Court, SAVAGE, C. J. Though I find no cases in point upon the question presented, either in England or this state, there are several which bear upon it. In the case of *Van Alen v. Rogers*, 1 Johns. Cas. 281 [1 Am. Dec. 113], the defendant held the premises under a contract with the devisor of the plaintiff. In an action for mesne profits, the defendant offered to prove that by permission of the original owner he built a house, barn, and store then occupied by the plaintiff. The court say the improvements were made antecedent to the plaintiff's title; if the defendant is entitled to compensation he must seek it from the personal representatives of the devisor; not from the plaintiff. They do not say what they would have held if the original owner had brought the suit. In *Murray v. Gouverneur*, 2 Johns. Cas. 441, 442, in error [1 Am. Dec. 177], Kent, J., who gave the opinion of the court, says: "As to the sum expended for repairs, it may be left for liquidation in an action for the mesne profits, if the respondents should think proper to sue for the rents and profits. The action for mesne profits is a liberal and equitable one, and will allow of every kind of equitable defense." In *Moore v. Cable*, 1 Johns. Ch. 387, 388, the question was whether a mortgagee in possession was entitled to his improvements against the mortgagor, applying to redeem. The Chancellor decided he was not, but that the mortgagee should not be holden to allow for rents and profits, which had exclusively arisen from his own expenditures in improvements; and that he should be allowed for necessary repairs though not for clearing land.

There is certainly no reason, in general, why the owner of land should be compelled to pay for improvements which he neither directed nor desired, as a condition on which he is to gain possession of his property. But when an occupant has taken possession under a *bona fide* purchase and made permanent improvements, it is very hard for him to lose both land and improvements. If the plaintiff is not content with acquiring possession of his property in an improved condition, after he has neglected to assert his title for a number of years, it is certainly equitable that the defendant should be allowed the value of his improvements, made in good faith, to the extent of the rents and profits claimed. This view of the subject is fully supported by *Green v. Biddle*, 8 Wheat. 81, 82, and the authorities there cited, especially *Coulter's Case*, 5 Co. 30. Most clearly the defendant should not be compelled to pay an enhanced rent in consequence of his own improvements. The defendant is entitled to a new trial.

New trial granted.

COMPENSATION FOR IMPROVEMENTS IN EJECTMENT.—At common law the owner of land on recovering it in ejectment was not bound to make compensation to the defendant for improvements made on the premises, since the latter was presumed to have made them at his own risk: 2 Kent Comm. 334; *Parsons v. Moses*, 16 Iowa, 444; *Lunquest v. Ten Eyck*, 40 Id. 213. The rule of the civil law was more liberal and allowed one who had made improvements on land in his possession, under the *bona fide* belief that he was the owner of it, to exact full compensation for the value of such improvements, less the value of the use of the land, before he could be compelled to surrender it: *Bright v. Boyd*, 1 Story, 478; *Putnam v. Ritchie*, 6 Paige, 404. Courts of equity first borrowed this rule of the civil law and applied it in all cases where the owner of land was compelled to resort to chancery to obtain relief, and insisted upon his doing equity, by paying for the *bona fide* possessor's ameliorations, before permitting him to call upon the latter for an account of the rents and profits: *Bright v. Boyd*, 1 Story, 478; *Putnam v. Ritchie*, 6 Paige, 404. Coming thus, by the way of the equity courts, this civil law doctrine was imported into the common law courts and was applied to the equitable action of trespass on the case for mesne profits, in which action, when brought by the successful plaintiff in ejectment, he was allowed to recover only the excess of the rents, profits and damages, after deducting the value of the permanent and beneficial improvements made by the defendant in good faith and in the honest belief that the land was his own: Tyler on Ejectment, 849.

This is in accordance with the history of the doctrine as given by Judge Dillon, in delivering the opinion of the court in *Parsons v. Moses*, 16 Iowa, 444: "By the English and American common law the true owner recovers his land in ejectment without liability to pay for improvements which may have been made upon it by an occupant without title. Improvements annexed to the freehold the law deems part of it, and they pass with the recovery. Every occupant makes improvements at his peril even if he acts under a *bona fide* belief of ownership: 2 Kent Comm. 334. Such is the rigid rule of the common

law. It is founded upon the idea that the owner should not pay an intruder or disseisor, or occupant, for improvements which he never authorized. It is supposed to be founded in good policy, inasmuch as it induces diligence in the examination of titles, and prevents intrusions upon, and appropriations of, the property of others.

"Chancery, borrowing from the civil law, made the first innovation upon the common law doctrine. And it came at length to be held in equity that when a *bona fide* possessor of property (for equity, no more than law, would aid a *mala fide* possessor), made meliorations and improvements upon it in good faith, and under an honest belief of ownership, and the real owner was, for any reason, compelled to come into a court of equity, that court, applying the familiar maxim, that he who seeks equity must do equity, and adopting the civil law rule of natural equity would compel him to pay for those improvements or industrial accessions, not the cost indeed, but so far as they were permanently beneficial to the estate and enhanced its value: Story Eq. Jur. 779 a., 779 b; *Putnam v. Ritchie*, 6 Paige, 390; *Bright v. Boyd*, 1 Story, 478, enriched by the learning and research of that distinguished jurist; 8 C., 2 Id. 605; *Green v. Biddle*, 8 Wheat. 77; Willard's Eq. 312; Sugd. on Vend. c. 22, secs. 54, 55, 57.

"This was the extent of relief to *bona fide* possessors. 'I have not,' says Chancellor Walworth, in *Putnam v. Ritchie*, 6 Paige, 390, 'been able to find any case, either in this country or in England, wherein the court of chancery has assumed to give relief to a complainant who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter after he had knowledge of his legal rights.' Courts of law next modified the strict rule of the common law (which makes the occupant of land which is owned by another, no matter how good the faith of the occupant may be, liable for the rents and profits), to this extent, viz., that where such owner brought his action for meane profits, which courts of law treated as an equitable action, the *bona fide* occupant might set off or recoup the value of his permanent improvements to the extent of the rents and profits demanded, but no further: *Jackson v. Loomis*, 4 Cow. 168; *Murray v. Gouverneur*, 2 Johns. Cas. 438 [1 Am. Dec. 177]; *Green v. Biddle*, 8 Wheat. 1, 75, 76; 2 Kent, 335, and cases in note; *Putnam v. Ritchie*, 6 Paige, 404; *Hilton v. Brown*, 2 Wash. C. C. 165; *Davis v. Smith*, 5 Ga. 274. The equity of the *bona fide* possessor who had made lasting and permanent improvements upon lands which turned out to be another's, was so strong and persuasive as to force its recognition to this partial extent by courts of law, without the aid of statute."

It is settled, in accordance with what is here laid down, that to the extent of the rents and profits, one who while in possession of land in good faith, believing it to be his own, has made permanent improvements thereon, may set off the value of such improvements against the true owner, upon his recovering possession of the premises: Tyler on Ejectment, 849; *Stark v. Starr*, 1 Sawyer, 15. It is so provided now by express statute in most of the states.

BONA FIDES NECESSARY.—Says Dwight, Commissioner, in *Woodhall v. Rosenthal*, 61 N. Y. 396: "It is only a *bona fide* occupant of land who is allowed to mitigate the damages, by offsetting the value of his improvements to the extent of the rents and profits claimed. This was the rule of the civil law which has gone farthest in allowing this class of defenses. The mitigation of damages in this manner is made on equitable grounds, and it would be plainly inequitable to allow them to one who acted with knowledge of the

plaintiff's rights: *Green v. Biddle*, 8 Wheat. 1; *Dothage v. Stuart*, 35 Mo. 251; *White v. Moses*, 21 Cal. 34; Sedg. on Dam. 128, 127; *Jackson v. Loomis*, 4 Cow. 168; 2 Kent Com. (12 ed.) 334-338, and cases cited. As the defendants had full means of knowledge of the plaintiff's claim, they can not bring themselves within this rule." See, also, *Barlow v. Bell*, 1 A. K. Marsh. 246; *Hawkins v. King*, 1 T. B. Mon. 161; *Harrison v. Fleming*, 7 Id. 537.

By possession in good faith is meant the possession of one who believes he has good title, and has no notice of the adverse claim: Sedg. on Dam. 126; *Houston v. Sneed*, 15 Tex. 307; *Sartain v. Hamilton*, 12 Id. 219. But improvements made by an occupant on land acquired *mala fide*, or with notice of an adverse title, will not be respected: *Patrick v. Marshall*, 2 Bibb, 40; *McKim v. Moody*, 1 Rand. 58. So one purchasing pending litigation concerning the land, and with notice of it, is not entitled to compensation for improvements made by him: *Henderson v. Pickett*, 4 T. B. Mon. 54. So, improvements made after the commencement of the action are not, in legal contemplation, *bona fide*: *Taylor v. Whiting*, 9 Dana, 399. Much less those made after a decision against the title under which the occupant claims: *Bell v. Barnett*, 2 J. J. Marsh. 516. So, where the title under which the defendant claims is acquired after the action is commenced: *Townsend v. Shipp*, Cooke (Tenn.), 293. And where the title of the defendant is fraudulent and void, and he is a party to the fraud, he is held not to be entitled to compensation for betterments under the Vermont statute: *Thompson v. Gilman*, 17 Vt. 109. Otherwise, if he holds *bona fide* under an apparent title which he believes to be good: *Strong v. Hunt*, 20 Vt. 614; *Whitney v. Richardson*, 31 Id. 300. So, under the California statute, the defendant can set off the value of his improvements against the damages in ejectment only where he claims in good faith under color of title: *Welch v. Sullivan*, 8 Cal. 511; *Love v. Shartzer*, 31 Id. 487; *Carpenter v. Small*, 35 Id. 346; *Carpentier v. Mitchell*, 29 Id. 330.

The right to set off improvements depends upon the good faith of the occupant and not upon any lack of diligence in the owner in claiming his rights; hence, the fact that while the improvements were in progress, the owner was not in a condition to assert his title, will not affect the defendant's right of set-off: *Whitney v. Richardson*, 31 Vt. 300. The presumption is that improvements made by one in possession under color of title were made *bona fide*: *Stark v. Starr*, 1 Sawyer, 15.

THE TITLE UNDER WHICH IMPROVEMENTS ARE MADE may be wholly null without affecting the right of set-off, if the requisite *bona fides* exists. Thus it has been held that a *bona fide* occupant under a void deed may set off the value of his improvements to the extent of the rents and profits: *Jones v. Perry*, 10 Yerg. 59. So under the Kansas "occupying claimant" act: *Krause v. Means*, 12 Kan. 335. Nor need it be an absolute fee, simple title, nor one adverse to that of the true owner, provided only it is such in appearance and duration as to justify the defendant as a prudent man in making the improvements. Thus it was decided in *Withers v. Yeardon*, 1 Rich. Eq. (S. C.) 324, that one holding under a long lease, which he in good faith believed to be binding, was entitled to compensation for his improvements. So in *Bedell v. Shaw*, 59 N. Y. 46, it was held on the authority of the principal case, that improvements made by an occupant *bona fide*, under a lease for one thousand five hundred years, made by the authorities of a city corporation, for the collection of a street assessment, might be set off on a recovery by the true owner, on the ground of the invalidity of the proceedings, although the possession was not adverse, so as to mature into a title under the statute of limitations; but a mere tenant at will is, of course, not entitled to compensation for im-

provements: *Pomeroy v. Lambeth*, 1 Ired. Eq. 65. But it seems that there must be some claim of title to the identical land upon which the improvements were put: *Sherrod v. Cisco*, 4 Sandf. 480. Under the "occupying claimant" acts of several of the states, it has been held that one who through mistake, as to the location of the boundaries of land claimed by him, has placed improvements on land outside those boundaries owned by another, is not entitled to compensation therefore, unless the true owner has been guilty of fraud or laches in not notifying him to desist: *Scroggs v. Taylor*, 1 A. K. Marsh. 247; *Waldron v. Woodcock*, 15 Ohio, 13; *King v. Potter*, 18 Mich. 134. But see *Union Hall Association v. Morrison*, 39 Md. 281, and *McKeeney v. Armour*, 10 N. J. Eq. (2 Stock.) 115.

IMPROVEMENTS MUST BE PERMANENT AND BENEFICIAL.—Inasmuch as the right to compensation for improvements, whether in courts of law or chancery, and whether with or without the aid of a statute, is founded upon the equitable principle that one man shall not appropriate a benefit derived from another's labor or expenditure without paying him for it, the measure of compensation is the benefit to the owner of the land. However great may have been the expenditures of the occupant, if they have not made the premises more valuable to the owner, the latter is under no just or equitable obligation to make compensation. The improvements therefore must be both permanent and beneficial to the owner: *Deady, J.*, in *Stark v. Starr*, 1 Sawyer, 15; *Gill v. Patten*, 1 Cr. C. C. 465; *Woodhull v. Rosenthal*, 61 N. Y. 397; *Whitledge v. Wail*, Sneed (Ky.) 397; *Bell v. Barnet*, 2 J. J. Marsh. 516; S. C., 7 Id. 379.

ALLOWED AT LAW ONLY AS SET-OFF.—Except where it is otherwise provided by statute, the value of improvements can be allowed in courts of law only as a set-off against the claim of the owner for damages and rents and profits, and only to the extent of such damages, rents and profits. Says Walworth, Chancellor, in *Putnam v. Ritchie*, 6 Paige, 390: "This principle of natural equity has been adopted by the law of England and of this state to a limited extent, in the action for mesne profits; where the *bona fide* possessor is permitted to offset or recoup in damages the improvements he has made upon the land, to the extent of the value of the rents and profits during his occupancy." That this is the extent to which the claim for compensation will be allowed at law, see, also, the opinion of Washington, J., in *Green v. Biddle*, 8 Wheat. 1; see, also, *Wernke v. Hazen*, 32 Ind. 431; *Yount v. Howell*, 14 Cal. 465. The rents and profits are the natural and appropriate fund to pay for ameliorations of land. Says Lord Kames, in his *Principles of Equity*, book 3, c. 1, p. 276: "It is a maxim suggested by nature that reparations and meliorations, bestowed upon a house or upon land, ought to be defrayed out of the rents."

Since the allowance for improvements, in such cases, is in the nature of a set-off, and depends upon equitable principles, no claim can be made for improvements put upon the land before the plaintiff's title accrued: *Bay v. Pope*, 18 Cal. 694. And, further, it is held, under the California statute, that the value of improvements can not be set off, unless the defendant asks it in his answer: *Moss v. Shear*, 25 Cal. 38; *Carpentier v. Gardiner*, 29 Id. 160. And under the Mississippi statute, unless mesne profits are claimed, the value of improvements can not be set off: *Learned v. Corley*, 43 Miss. 687. And the rule is the same independently of the statute, as is abundantly shown by the cases already cited.

RULE IN EQUITY.—While it is well settled, as already stated, that one who, while in possession of land, believing it to be his own, makes permanent

improvements thereon, *bona fide*, is entitled to compensation as against the real owner, where the latter comes into equity to assert his title and to obtain possession, or where there is any fraud: Story Eq. Jur., sec. 1238; *Hall v. Brumhal*, 7 Bush, 43; there is a conflict of authority upon the point as to whether a defendant in ejectment, after being evicted at law, can file his bill in equity for compensation for his improvements. Chancellor Walworth maintained, in *Putnam v. Ritchie*, 6 Paige, 404, that the relief could be had only in those cases where the real owner was compelled to come into equity to establish his title, or where there was fraud, and that no bill for compensation for improvements would lie where the owner could recover possession at law. He says: "I have not, however, been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter, after he had knowledge of his legal rights. I do not, therefore, feel myself authorized to introduce a new principle into the law of this court without the sanction of the legislature, which principle, in its application to future cases, might be productive of more injury than benefit." This decision is approved in the learned opinion of Moncre, P. J., in *Graeme v. Cullen*, 23 Grat. 266. So it was held in *Winthrop v. Huntington*, 3 Ohio, 327, that one who entered under color of title, paid taxes and made improvements as owner, could not, on being ejected in an action at law, come into equity for compensation for his improvements, but would be regarded as a mere volunteer: See, also, *Morris v. Terrell*, 2 Rand. 6; and *Moody v. Harper*, 38 Miss. 599.

On the other hand it was held by Judge Story, after mature deliberation, in *Bright v. Boyd*, 1 Story, 478, S. C. 2 Id. 605, that one who purchased at an administrator's sale and believing himself to be the owner of the land, went on in good faith, and made valuable and lasting improvements, and was afterwards evicted on the ground that the sale was void, could maintain a bill in equity for compensation for his improvements. At the final hearing in 2 Story, 605, he thus emphatically laid down the law: "I wish in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and I may add, common sense and common justice, for its foundation. The betterment acts (as they are commonly called) of the States of Massachusetts and Maine, are founded upon the like equity, and were manifestly intended to support it, even in suits at law for the recovery of the estate."

This decision was fully approved in *Union Hall Association v. Morrison*, 39 Md. 281, where a purchaser, in good faith, who had made valuable and permanent improvements, on being evicted by a paramount title, was allowed to recover compensation for his improvements in equity, but as the defendant had been guilty of no fraud, he was given the option either to pay the value of the improvements or to accept from the complainant the value of the land, exclusive of improvements, and to make him a conveyance. So in *Hatcher v. Briggs*, 6 Or. 31; a defendant in ejectment filed a cross-bill in

equity setting up the fact that he had purchased the premises in good faith at a partition sale, which he erroneously believed that the court had a right to order, and that he had made permanent and valuable improvements, and it was held on the authority of *Bright v. Boyd*, that he was entitled to compensation therefor after deducting the rents and profits, and that the plaintiff should not be allowed to recover possession except upon payment of such compensation. Similar relief was granted in *McKelway v. Armour*, 10 N. J. Eq. (2 Stock) 115. To the same effect substantially, are *Bell v. Barnett*, 2 J. J. Marsh. 516, and *Thomas v. Thomas*, 16 B. Mon. 420. The doctrine of *Bright v. Boyd* is approved, also in *Valle v. Fleming*, 29 Mo. 152; and in *Kanawha Coal Co. v. Kanawha and Ohio Coal Co.* 7 Blatch. 391; but is questioned apparently in *Graeme v. Cullen*, 23 Grat. 266. The principle upon which *King v. Thompson*, 9 Pet. 204, was decided, is in accord with *Bright v. Boyd*, and is followed in *Gibert v. Peteler*, 38 Barb. 488, where *Putnam v. Ritchie*, 6 Paige, 404, seems to be doubted.

JACKSON EX DEM. CADWELL v. KING.

[4 COWEN, 207.]

VOLUNTARY DEED is good between the parties and against the heirs of the grantor.

ONUS OF PROOF OF INSANITY is upon him who alleges it, or seeks to avoid an act on account of it; but if general derangement be once shown, the burden of proof is shifted to him who asserts that the act was done in a lucid interval.

AN INSANE PERSON is one who having once had understanding, has wholly lost it.

IMBECILITY OR WEAKNESS OF UNDERSTANDING, not amounting to idiocy nor lunacy, is not sufficient to avoid a deed at law, though the grantor may have been a fit subject for a commission in the nature of a writ *de lunatico inquirendo*.

THE VALIDITY OF A DEED is not affected by a commission subsequently adjudging the grantor to be an imbecile.

WEAKNESS OF UNDERSTANDING, even when not sufficient to avoid a deed at law, may furnish strong ground to suspect fraud and imposition.

FRAUD in procuring a conveyance from a person of weak understanding is a good ground for relief in equity. Relief may, in some cases, be obtained at law, where the fraud is clearly established.

FRAUD—LAW AND EQUITY.—The distinction between legal and equitable jurisdiction upon fraud is this: that at law it must be proved, not presumed, while in equity it may be presumed from the nature of the transaction, the situation of the parties, and other circumstances.

EJECTMENT. The lessors of the plaintiff claimed the premises as children and heirs of Moses Cadwell, deceased, the former owner. The defendants, who were in possession when the action was commenced, claimed title through a deed of bargain and sale from Cadwell to one J. W. Smith, who was intermarried with the daughter of a woman with whom Cadwell lived in

adultery for some years before his death, the said Smith having subsequently conveyed the premises to the defendants. The validity of Cadwell's deed to Smith was disputed on the ground that he was *non compos mentis*. It was executed July 1, 1816, when Cadwell was about fifty years of age. The consideration expressed was two thousand five hundred dollars, only a small part of which was actually paid. The substance of the evidence on the question of competency is sufficiently stated in the opinion. The judge charged the jury that to render the deed invalid, it must appear that Cadwell was not in a condition to transact that particular business rationally; not on the one hand that he should be capable of doing all kinds of business with judgment and discretion, nor on the other that he should be wholly deprived of reason so as to be incapable of doing the most familiar and trifling work, and that if they were satisfied that his mind and memory were in such a situation at the time of executing the deed as to render him wholly incompetent to judge of his rights and interests in relation to that transaction, the deed was void, and they should find for the plaintiff; otherwise for the defendant. Verdict for the plaintiff, and motion for a new trial.

J. L. Wendell and A. Spencer, for the motion, contended: 1. That the charge was wrong, for the judge should have told the jury that Cadwell was of capacity to convey unless he was wholly deprived of reason—an idiot or a lunatic; and that no degree of mental incapacity short of this would constitute legal incompetency, citing 2 Mad. Ch. (Am. ed. 1817) 568, 572; *Matter of Barker*, 2 Johns. Ch. 232; 1 Harr. Ch. 738; *Van Alst v. Hunter*, 5 Johns. Ch. 158; *Ex parte Holyland*, 11 Ves. 11; *Hathorn v. King*, 8 Mass. 372 [5 Am. Dec. 106]; *Ex parte Cranmer*, 12 Ves. 445; 2. That the verdict was against the weight of evidence; 3. That the question of granting a new trial must be determined on a view of the whole case including both the law and the facts, citing *Bright v. Eynon*, 1 Burr. 390; *Halsey v. Watson*, 1 Cai. 24; *Jackson v. Sternbergh*, Id. 162; *Jackson v. Laird*, 8 Johns. 489; *McConnel v. Hampton*, 12 Id. 384; *Wilkie v. Roosevelt*, 3 Johns. Cas. 206 [2 Am. Dec. 146].

D. Russell and A. Van Vechten, *contra*, insisted: 1. That technical idiocy or lunacy was not required to constitute legal incompetency, but that it was enough if the party was in such a state of imbecility as not to be capable of acting under a proper apprehension of his rights and duties, and that he might show his

own incompetency to avoid his deed, citing *Matter of Barker*, 2 Johns. Ch. 232, and cases cited; Highmore on Lunacy (Am. ed. 1822), 101, 102, 123, 124; *Webster v. Woodford*, 3 Day. 90; 2. That a new trial will not be granted solely on the ground that the verdict is against the weight of evidence: *Walker v. Smith*, 4 Dall. 389, 391; *Wait v. McNeil*, 7 Mass. 261; *Hurtin v. Hopkins*, 9 Johns. 36; unless, as in *Wilkie v. Roosevelt*, 3 Johns. Cas. 206 [2 Am. Dec. 146], where the fact was palpably and unmistakably contrary to the verdict.

By Court, WOODWORTH, J. If the deed from Cadwell to Smith is valid the plaintiffs cannot recover. The execution appears to be sufficiently proved by the subscribing witnesses; and there was an acknowledgment before a master in chancery. If voluntary it is good between the parties; for the heir cannot set up the want of consideration in the deed from his ancestors: 16 Johns. 189. But it is contended that Cadwell was *non compos*, or not of sound mind. The rule applicable to such cases is, that where the act of a party is sought to be avoided on the ground of mental disability, proof of the fact lies upon him who alleges it, and until the contrary appears, sanity is to be presumed. One of the qualifications of this rule is, that after a general derangement has been shown, it is then incumbent on the other side to show that the party who did the act was sane at the very time when it was performed: *Jackson v. Van Dusen*, 5 Johns. 159 [4 Am. Dec. 330].

The first question is, have the plaintiffs established the fact of general derangement so as to impose on the other party the necessity of showing competency, or a lucid interval at the time the deed was executed. It becomes material to inquire what constitutes that derangement or imbecility of mind that renders a party incapable of contracting. Idiots and lunatics or persons *non compos* fall within the description. I apprehend the disability applies exclusively to such. Lord Coke defines *non compos mentis* "to be a person who was of good and sound memory, and by the visitation of God had lost it," or, "he that by sickness, grief or other accident, wholly loseth his understanding:" *Beverly's case*, 4 Co. 123; Co. Lit. 247, a. The deeds of all such persons are void; for the terms "*non compos*," of unsound mind, are legal terms, and import a total deprivation of sense: 2. Mad. 569. Prior to our revolution the court of chancery in England entertained jurisdiction in such cases only; mere imbecility of mind, not amounting to idiocy or lunacy, not being considered as sufficient to interfere with the

liberty of the subject over his person and property. Latterly a different doctrine has prevailed. The court of chancery has entertained jurisdiction in such cases. In the *Matter of Barker*, 2 Johns. Ch. 232, the cases on this subject are reviewed. It was considered as founded in good sense and the necessity of the case, for the protection of a numerous class of persons whose minds have sunk under the power of disease, or the weight of age, and were liable to become the victims of folly or fraud.

This enlarged jurisdiction seems to have sprung up since the time of Lord Hardwicke, and as Mr. Maddock observes, 2 Mad. Ch. 573: "was rather arbitrarily introduced, so much so, that it has more than once been hinted that legislative provision on the subject would be proper." Without, however, questioning the propriety of assuming jurisdiction in such cases, it may be observed that the doctrine, if well founded, does not prove that a deed fairly obtained from a person, who might be a fit subject for a commission in the nature of a writ *de lunatico inquirendo*, could be awarded in a court of law. Indeed, the contrary is strongly implied, for the ground of interference is, as Lord Erskine observes (12 Ves. 445), to protect a party in his second state of infancy. By such a proceeding the right of a party to contract who is incapable of managing his affairs, by reason of a partial derangement of mind, is taken for granted.

The question on the validity of a deed executed prior to a commission of this nature would not in the least be affected by such a commission. It must be shown that the grantor was *non compos*, within the legal acceptation of the term, that it was not a partial, but an entire loss of the understanding; for the common law seems not to have drawn any discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it. The difficulty of making such discrimination is apparent. If a man has sufficient capacity to work his farm, or tend his mill skillfully, will the law deny him the right of selling either? I apprehend not. How is a purchaser to protect himself, if the *quantum* of intellect is the criterion by which to determine whether the contract is valid? He may act with the utmost integrity, and yet be in danger; for although it be established that the party with whom he dealt had understanding, deemed sufficient for the prudent management of his affairs by this rule, the contract would be void. But weakness

of understanding is not, of itself, any objection in law to the validity of a contract. If a man be legally *compos mentis*, he is the disposer of his own property, and his will stands for a reason for his actions: *Osmond v. Filzroy*, 3 P. Wms. 129; Pow. on Cont. 30; 1 Fonbl. 60.

According to this doctrine, the plaintiff has failed to invalidate the deed on the ground that Cadwell was *non compos*. The testimony adduced at the trial clearly shows that he is not included in the legal definition of that term. It is abundantly proved by a number of witnesses that he was perfectly rational and possessed his ordinary intelligence at various times, when they saw, conversed, and transacted business with him up to the time of executing the deed; and from their intimate acquaintance, they pronounced him, in their opinion, of sound mind. It is true a number of the plaintiff's witnesses considered him of unsound mind, and incapable of managing his concerns; but on examining this testimony, it will be found that the opinion rests on specific facts which do not warrant an opinion to that extent. Much seems to have been inferred from the fact that he did not recollect persons coming to his mill; that he took no part in the settlement of his accounts, although present; that he indulged in idle stories; that he talked of turning the water back, so as to obtain the benefit of it the second time; that he was incoherent and unconnected in his statements, and greatly affected by very trivial circumstances. I admit these are proofs of a weak or impaired understanding, but they do not satisfactorily prove anything more.

From the same witnesses it may be collected that in some respects, at least, he was rational. It seems to be conceded that during all this time he was a miller, and did the work well, for there is no complaint. No witness states that he was deficient in conducting this business. This alone proves that he had memory and judgment. The taking of toll correctly, grinding the different kinds of grain so as to satisfy customers, and bestowing the care necessary to prevent confusion, is, of itself, satisfactory proof that he had competent understanding in this respect. Besides, he bought, sold and took notes. He, at different times after the deed was given, mentioned his inducement for making the conveyance. The cause for doing so is always stated in the same way. It can not be correctly said that in his situation it was unnatural or absurd. The fact that he had deserted his wife and children twenty years before, shows very clearly that they would not be the objects of his bounty. On

the whole, it appears to me that Cadwell had memory and judgment to a moderate extent, and was not disabled by law from selling his farm and giving the deed. The plaintiffs have failed in showing a general incapacity; at most, they have shown only a want of understanding on some occasions. There is not sufficient within the rule to impose on the defendants the necessity of proving that he was sane when he did the act.

The next question is, whether the evidence makes out a case of fraud or imposition. In discussing this point it is conceded that although mere weakness of understanding is insufficient, it furnishes strong grounds of suspicion that when persons in such a state execute conveyances they are acted upon by improper influence, and, therefore, wherever fraud can be collected from the circumstances of the transaction equity will interpose and relieve against it. Courts of law have also a concurrent jurisdiction with courts of equity where the fraud can be clearly established; and will relieve by making void the instrument: *Bright v. Eynon*, 1 Burr. 396; 1 Fonbl. 61. But courts of law have not in all cases of fraud a concurrent jurisdiction. Lord Coke, in 3 Inst. 84, in speaking of the jurisdiction of courts of equity as to frauds, covin and deceit, seems to admit that all frauds are not relievable at law. The distinction between legal and equitable jurisdiction upon fraud is this: that at law it must be proved, not presumed; so that equitable jurisdiction may be exercised upon an instrument unduly obtained, when a court of law could not enter into the question: 18 Ves. 483. In *Butcher v. Butcher*, 1 Ves. & B. 98, Lord Eldon observes that some judges have said that a deed can not be fraudulent unless it be fraudulent both in law and equity; but to that doctrine he could not agree, though a strong inclination had been evident to say, whatever is equity ought to be law, an opinion acted upon by Mr. Justice Buller, who had persuaded Lord Mansfield to act upon it, until it was reformed by Lord Kenyon with the assistance of the same judge; yet the clear doctrine of Lord Hardwicke and all his predecessors was that there are many instances of fraud that would affect instruments in equity of which the law could not take notice.

The broad ground assumed by Lord Mansfield, 1 Burr. 396, is, that courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud. This doctrine has, however, been subsequently qualified according to the distinction taken by Lord Eldon, and is founded in good sense. I am not aware of any express adjudication in our courts. But

in 4 Desau. Ch. 684, it is sanctioned. It was there held that fraud may be presumed in equity but must be proved at law. In accordance with these principles, a variety of cases have been decided, and relief afforded, in equity, where, from the nature of the transaction and the situation of the parties, fraud and imposition might be presumed: 3 P. Wms. 129; Pow. on Con. 31. So, also, in *Chesterfield v. Jansen*, 2 Ves. 155, Lord Hardwicke describes one species of fraud that may be presumed from the circumstances and condition of the parties contracting. And this, he says, goes further than the rule of law, which is, that fraud must be proved, not presumed. Inadequacy of consideration is also a badge of fraud or a fact connected with other circumstances from which fraud may be inferred: 1 Bro. Ch. Cas. 1. So, also, a conveyance obtained from persons uninformed of their rights will be set aside, though no actual fraud be proved: 2 Id. 150. In these and many other cases that might be cited, equity considers the instruments as obtained fraudulently, from the circumstances and relation of the parties, although no actual fraud is proved. Yet in none of these cases has it been decided that a court of law would declare the instrument void.

If the preceding doctrine be correct, it follows that the facts disclosed in this case are not of a character to entitle a court of law to declare the deed void. I have not discovered any evidence of actual fraud by the grantee of Cadwell, or that any deception was practiced, or inducements held out to gain the title. If the plaintiffs are entitled to relief, it must be in equity, on the ground of age, imbecility, the consideration and nature of the contract from which fraud is to be inferred. I apprehend, however, that enough is not shown to set aside the deed in that court. Cadwell appears to have been the actor, and to have understood the transaction. He takes care to provide for himself, his wife, and the woman with whom he had cohabited, and in consequence of age and infirmity, is willing to surrender the property into other hands; not to a stranger, but one who had married a person reared in his family, and to whom he probably considered himself *in loco parentis*. There is nothing so surprising or unusual in such a course as to excite suspicion; and as imbecility of mind, singly, is not sufficient, I incline to think that relief should be denied. Be that as it may, a court of law is not the proper forum.

On the whole I am of opinion that the verdict be set aside and a new trial granted.

New trial granted.

THE LIABILITY OF INSANE PERSONS ON CONTRACTS is a subject upon which there has been considerable diversity of adjudication. "It is evident," says Redfield, C. J., in *Lincoln v. Buckmaster*, 32 Vt. 659, "from a careful examination of the decided cases, that the law is not fully settled as to the extent of the liability of lunatics arising out of contracts." And Scudder, J., in *Eaton v. Eaton*, 37 N. J. L. (8 Vr.) 103, remarks that "an examination of the cases on this subject, shows much conflict and some uncertainty." It is true, as a general proposition, that one who is *non compos mentis*, whether by reason of insanity or of idiocy, cannot make a binding contract, because there cannot be that "agreement of minds" which is of the very essence of a contract: 1 Parsons on Con. 383; 1 Chit. on Con. 185, 188 (11 Am. ed.); 1 Story on Con. sec. 74; but the rule is subject to important limitations. It was for a long time the doctrine of the English courts that a person of full age would not be permitted to "stultify himself" by pleading his own mental incapacity in order to avoid his contracts: *Beverley's Case*, 4 Co. 123; Co. Lit. 247 b; but this doctrine is entirely exploded in America, and seems to be law no longer in England: 1 Parsons on Con. 383; 1 Story on Con. sec. 90, 81; 1 Chit. on Con. 187 (11th Am. ed.); 2 Kent Com. 451; *Webster v. Woodford*, 3 Day, 90; *Grant v. Thompson*, 4 Conn. 203; *Mitchell v. Kingman*, 5 Pick. 431; *Rice v. Peet*, 15 Johns. 503; *Lang v. Whidden*, 2 N. H. 435; *Bensell v. Chancellor*, 5 Whart. 378; *Gore v. Gibson*, 13 Mees. & W. 623.

TOTAL INCAPACITY MUST BE SHOWN.—It seems to be entirely settled that, in order to avoid a contract on the ground of mental unsoundness, there must be an inability to know "what the act is to which the contract relates," or "intelligently to will to do such act:" 1 Whart. & Stille's Med. Jur., sec. 2. So long as one possesses requisite mental faculties to transact rationally the ordinary affairs of life, he will not be relieved from the responsibility of the ordinary citizen: *Titcomb v. Vantyle*, 84 Ill. 371. To constitute such intellectual incapacity to transact business as will relieve a party from responsibility on his contracts, "there must be," says Walker, C. J., in *Baldwin v. Dunton*, 40 Ill. 188, "that degree of mental derangement, or state of imbecility of mind, that induces the belief that the party is incapable of fully comprehending the effects and consequences of his acts; or at least, that he is so weak as to be almost a mere instrument in the hands of the person seeking to obtain the advantage. On the contrary, if a person is capable of reasoning correctly on the ordinary affairs of life; or is capable of contemplating and understanding the consequences which usually accompany ordinary acts, he will be held *compos mentis*, and be bound by his acts." To the same effect was the charge of the court below in *Hovey v. Chase*, 52 Me. 305, and the rule laid down was fully approved by the supreme court.

The rule of the principal case that to produce legal incompetency, there must be a total deprivation of reason, was approved by Verplank, Senator, delivering the opinion of the majority of the court in *Stewart v. Lispenard*, 26 Wend. 255, as being the undoubted law on this subject. That decision, in its application of the rule, was, however, greatly questioned in *Delafield v. Parish*, 25 N. Y. 1. The rule seems to be briefly that, in order that one may bind himself by a contract, he must have sufficient intellectual capacity to know what he is doing. If he have less than this, whether by reason of general insanity, idiocy, or monomania affecting the subject of the contract, he is not bound. By this is not meant, however, that to constitute contracting power there must be sufficient discernment to enable one to transact his business with prudence and discretion. In *Moffitt v. Witherspoon*, 10 Ired. 185, the court below had instructed the jury that, in order to render a grantor

competent, "it was not sufficient that she should be able merely to answer familiar questions, but to manage her business with judgment and discernment." In passing upon this instruction, Nash, J., delivering the opinion of the supreme court, said: "We do not consider the rule so laid down to be correct. If all persons are to be judged incapable of making contracts who do not manage their business 'with judgment and discernment,' we apprehend there are many more disqualified by law than are now considered so. We know no better rule upon this subject than that laid down by Lord Coke, that the person must be able to understand what he is about. To the same effect is the language of Chief Justice Taylor, in the case of *Armstrong v. Short*, 1 Hawks. 11. The rule laid down by his honor was too broad, and well calculated to mislead the jury."

MERE WEAKNESS OF MIND NOT ENOUGH.—It is clearly established, as held in the principal case, that mere imbecility or weakness of mind, whether it be congenital, or the result of disease or decay of the faculties, is not, when unaccompanied by circumstances showing that it has been taken advantage of, a sufficient ground for avoiding a contract. Neither equity nor law will "graduate intellectual differences on a nicely adjusted scale." The line cannot be safely drawn at any point except where total intellectual incapacity begins. A valuable case on this point is *Dennett v. Dennett*, 44 N. H. 531, where Bell, C. J., delivering the opinion of the court, says: "In former times it was held, and that seems to be the received doctrine in some courts quite recently, that '*non compos mentis*' is one 'that by sickness, grief or other accident, wholly loseth his understanding:' *Beverly's case*, 4 Co. 123; Co. Lit. 247, a. That 'the terms *non compos mentis*, of unsound mind, are legal terms, and import a total deprivation of sense:' 2 Mad. Ch. 727. And that to invalidate a deed, it must be shown that the grantor was *non compos mentis* within the legal acceptance of the term; that it was not a partial, but an entire loss of the understanding, for the common law seemed not to have drawn any discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it: *Jackson v. King*, 4 Cow. 216; *Blanchard v. Nestle*, 4 Denio, 41.

"This view of the law we do not understand to prevail here, but the truth is held to lie between these extremes. Every person is to be deemed of unsound mind who has lost his memory and understanding, by old age, sickness or other accident, so as to render him incapable of transacting his business, and of managing his property: *Re Barker*, 2 Johns. Ch. 232; see 1 Paige, 173; 21 Vt. 170. When it appears that a grantor had not strength of mind and reason to understand the nature and consequences of his act in making a deed, it may be avoided on the ground of insanity: *Davies v. Grindley*, Shelf. Lun. 266. A man by the bare execution of an instrument does not make it his deed, if at the time he was so weak in mind as to be incapable of understanding it if explained to him: *Mannin v. Ball*, 1 Sm. & Batt. 185; S. C., 1 Dow. P. C., (N. S.) 381; 1 Bligh, N. S., 1. All that the law requires to make a deed effectual is that a man should have possession of his reason, so as to know the effect of the act he is about to perform, and to be capable of carrying that act into effect: *Creagh v. Blood*, 2 Jones & Lat. 509.

"The question, then, in all cases where incapacity to contract, from defect of mind, is alleged, is not whether a person's mind is impaired, nor if he is afflicted by any form of insanity, but whether the powers of his mind have been so far affected by his disease, as to render him incapable of transacting business like that in question. An impaired condition of the mental powers, such as may be inferred by the medical expert, may constitute mere weakness

of mind, or a complete prostration of the faculties: Wh. & St. Med. Jur. sec. 74. In the last case there may be no delusive impression, nor false assumption of fact, nor confused hurry of mind, nor uncontrollable impulses, such as characterize ordinary insanity; but the mind is inert, the memory is unable to recall, and the mind to retain, in one view all the facts upon which the judgment is to be formed, for so long a time as may be required for their due consideration: *Converse v. Converse*, 21 Vt. 168. Such weakness may be the sudden result of disease, as in cases of paralysis, but is generally more or less gradual in its approach, scarcely perceptible at first, and becoming more apparent with the lapse of time and increasing disease. No marked line can be drawn at which weakness of mind becomes so great that the party ceases to be capable of binding himself by his contract or conveyance. The judicial investigations of insanity are, therefore, for the most part confined to the inquiry whether such a state of insanity exists as actually disqualifies the person from conducting himself consistently with the personal safety of himself and others, or from managing and disposing of his own affairs and property.

"Weakness of understanding is not of itself any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions. If a man be legally *compos mentis*, he is the disposer of his own property, and his will stands for the reason of his actions: *Osmond v. Fitzroy*, 3 P. Wms. 129; Shelf. Lun. 37. But it is held that though weakness of understanding is insufficient to avoid a deed, it furnishes ground for suspicion of improper influence, and, therefore, wherever fraud can be inferred from the circumstances of the transaction, equity will interpose to relieve against it: *Jackson v. King*, 4 Cow. 216. The doubtful and uncertain point at which the disposing mind disappears, and where incapacity begins, can be ascertained only by an examination of the particular circumstances of each case, to be duly weighed and considered by the court or jury; and in determining the question, the common sense and good judgment of the tribunal, must be mainly relied on."

It is well settled, therefore, that unless there is inadequacy of consideration, or some other evidence of fraud, imposition, or overreaching, any degree of imbecility or insanity short of total business incapacity will not suffice to avoid a contract: *Hall v. Perkins*, 3 Wend. 626; *Odell v. Buck*, 21 Id. 142; *Petrie v. Shoemaker*, 24 Id. 85; *Person v. Warren*, 14 Barb. 488; *Hirsch v. Trainer*, 3 Abb. New Cas. 274; *Darnell v. Rowland*, 30 Ind. 342; *Henry v. Ritenour*, 31 Id. 136; *Beller v. Jones*, 22 Ark. 92; *Farnam v. Brooks*, 9 Pick. 212; *Mann v. Batterly*, 21 Vt. 326; *Clearwater v. Kinler*, 43 Ill. 272; *Sheldon v. Harding*, 44 Id. 74; *Henderson v. McGregor*, 30 Wis. 78; *Gartside v. Isherwood*, 1 Bro. C. C. 56; 1 Story Eq. Jur. sec. 238; 1 Story on Con. sec. 77, and cases cited. But where there are other evidences of fraud or advantage taken, the imbecility or weakness of mind of the party defrauded or overreached, may become a controlling circumstance: *Darnell v. Rowland*, 30 Ind. 342; *Henry v. Ritenour*, 31 Id. 136; *Rhodes v. Bate*, 1 L. R. Ch. 252; *Seely v. Price*, 14 Mich. 541; *Garrow v. Brown*, Winst. Eq. part 2 (N. C.), 46; *Taylor v. Patrick*, 1 Bibb. 168; *Rutherford v. Ruff*, 4 Desau. Eq. 350; 1 Whart. & Stille's Med. Jur. sec. 10.

PARTIAL INSANITY, also, will not avoid a contract unless it exists with reference to the subject of the contract, although it may be considered in determining whether the party has been imposed upon: *Galpin v. Wilson*, 40 Iowa, 90; see, also, the learned and elaborate opinion of Lord Brougham in *Waring v. Waring*, 6 Moore P. C. 341. Many forms of insanity, as is well

known, do not affect the capacity to transact business with ordinary sagacity: *Searle v. Galbraith*, 73 Ill. 269. Occasional insanity, such as that arising from intemperance, will not avoid a contract, unless it is affirmatively shown to have existed at the time: *Lewis v. Baird*, 3 McLean, 56. So of temporary hallucinations, or the delirium produced by disease: *Staples v. Wellington*, 58 Me. 453, 459. In the case last cited, Appleton, C. J., says: "Now hallucination is not *per se* insanity. It does not necessarily avoid a contract. It may exist as to matters in no way affecting the capacity to contract. The medical definition of hallucination adopted by Worcester is, a 'morbid error, in one or more of the senses; a perception of objects which do not, in fact, make any impression upon the external senses; delirium, delusion.' The state of mind indicated by hallucination is strikingly illustrated by the remarkable story of Nicolai, the Berlin bookseller, who, for a length of time, was visited at his bedside by individual forms that were visible to his sight, and addressed him. During all this period he was conscious that it was a delusion. Still he transacted his ordinary business with his usual ability, and his contracts were as valid as if the delusion had not existed.

"If the delusion or the delirium is that caused by disease, it is obviously temporary in its character. It will continue only during the continuance of the fever in which it originated. If a fever is shown to exist at a given date, the law does not presume its continuance as in the case of fixed insanity. So there is no presumption of law as to the continuance of the temporary hallucination or delusion resulting from disease. The party claiming to avoid a contract, by reason of temporary hallucination or delusion, must show its existence at the time of the contract sought to be avoided for such cause, and that it was of a character affecting his capacity to make the contract sought to be avoided. It is undoubtedly true, that when an hallucination has become permanent, it is deemed insanity, general or particular, according to the nature of the delusion under which the patient labors."

CONTRACTS OF LUNATICS, WHETHER VOID OR VOIDABLE. — The principal difference of opinion concerning the law of this subject is as to whether the insanity of a party renders a contract absolutely void or merely voidable. The strong tendency of the later cases is to put the contracts of lunatics before office found upon the same footing with those of infants: 1 Chit. on Con. 188 (11 Am. ed.); *Ingraham v. Baldwin*, 9 N. Y. 45. The prevailing doctrine is, therefore, at least in this country, that in general the deed or other contract of an insane person is voidable rather than void: *Jackson v. Gumaer*, 2 Cow. 552; *Ingraham v. Baldwin*, 9 N. Y. 45; *Hallett v. Oakes*, 1 Cush. 296; *Carrier v. Sears*, 4 Allen, 336; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Id. 279; *Bond v. Bond*, 7 Id. 1; *Wait v. Maxwell*, 5 Pick. 217; *Allis v. Billings*, 6 Met. 415; *Key v. Davis*, 1 Md. 32; *Chew v. Bank of Baltimore*, 14 Id. 299; *Hovey v. Hobson*, 53 Me. 453; *Breckinridge v. Ormsby*, 1 J. J. Marsh. 236; *Crouse v. Holman*, 19 Ind. 30; *Somere v. Pumphrey*, 24 Id. 231; *Nichol v. Thomas*, 53 Id. 42; *Fitzgerald v. Reed*, 9 S. & M. (Miss.) 94; *Elston v. Jasper*, 45 Tex. 409; *Eaton v. Eaton*, 37 N. J. L. (8 Vr.) 108; *Allen v. Berryhill*, 27 Iowa, 540; 1 Para. on Con. 384; see, also, Mr. Ewell's notes to *Burke v. Allen*, Ewell's Lea. Cas. 587, and *Desilver's Estate*, Id. 569. In *Burke v. Allen*, 29 N. H. 106; S. C., Ewell's Lea. Cas. 576, the court thought it would be going too far to hold all contracts of insane persons absolutely void, but were, nevertheless, of the opinion that a distinction should be made between the voidability of such contracts and that of agreements made by infants, to the extent at least of allowing the maker of a note indorsed by a lunatic to set up the fact of such lunacy in an action by

the indorsee, although he would have no right to do so if the indorser were merely an infant. The English doctrine seems to be that the deeds of insane persons are absolutely void: *Thompson v. Leach*, 3 Mod. 301; S. C., Ewell's Lra. Cas. 564. Says Scudder, J., in *Eaton v. Eaton*, 37 N. J. L. (8 Vr.) 108:

"While it is doubtless the settled law in England, confirmed by act of parliament, 7 and 8 Vict. c. 76, sec. 7, that a conveyance by feoffment or other assurance, as well as a deed of bargain and sale, release or grant, by an idiot or lunatic, is wholly void, yet, the weight of authority in this country favors the rule that the conveyances by deed, of persons of non-sane mind and of infants, are voidable, and not wholly void: 1 Pars. on Con. 283; 3 Washb. Real Prop. 558; 4 Kent Com. 450; Dart on Vend. and Pur. 3; 1 Story Eq. Jur., sec. 222, 223." It must be conceded, however, that the doctrine of the mere voidability of the contracts of insane persons has encountered strong opposition in some of the American courts. Thus, in delivering the opinion of the court, in *Dexter v. Hall*, 15 Wall. 9, Mr. Justice Strong presents a very forcible argument in favor of the proposition, that such contracts should be pronounced absolutely void: "Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding and of acting in the ordinary affairs of life, can make an instrument, the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds; but a lunatic or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he can not make a contract which may have any efficiency as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one who has obtained from him that which purports to be a contract, be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds, and as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have, had he been in full possession of ordinary understanding. While he continues insane he can not avoid it, and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself; yet, a lunatic, equally with an infant, is confessedly under the protection of courts of law as well as courts of equity. The contracts of the latter, it is true, are generally held to be only voidable (his power of attorney being an exception). Unlike a lunatic, he is not destitute of reason. He has mind, but it is immature, insufficient to justify his assuming a binding obligation, and he may deny or avoid his contract at any time, either during his minority or after he comes of age. This is for him a sufficient protection; but as a lunatic can not avoid a contract, for want of mental capacity, he has no protection, if his contract is only voidable."

It was not necessary, however, in determining the question which was before the court in that case, to decide this point. The question there was as to the validity of a power of attorney, executed by one who was insane, and it was held that, conceding that contracts of lunatics and infants stood upon common ground, such an instrument would be absolutely void. The same doctrine thus held by Mr. Justice Strong is maintained with much ability in the dissenting opinion of Cole, J., in *Allen v. Berryhill*, 27 Iowa, 540, where the authorities on both sides of the question are reviewed. See, also, *Van*

Deusen v. Sweet, 51 N. Y. 378, where it is explicitly laid down that the deed of one who is *non compos mentis* is absolutely void. To the same effect is the opinion of Gibson, C. J., in *Desilver's Estate*, 5 Rawle, 110.

EXECUTORY CONTRACTS.—In many of the cases on this subject a distinction is drawn, with respect to the validity of contracts of insane persons, between those which are executed and those which are executory. And, in general, it may be stated, that contracts of the latter class are much more readily avoided on this ground than those of the former. Thus, in *Musselman v. Cravens*, 47 Ind. 1, it was held that a note voluntarily given as a subscription to a college endowment might be avoided on a plea of insanity, although taken in good faith and acted upon by the other party, but that it would be otherwise as to an executed contract. Indeed, the general doctrine is that an executory contract of one who is insane can not be enforced against him, however fairly or honestly it may have been entered into. Thus, in *Van Patton v. Beals*, 46 Iowa, 62, it was decided that a lunatic signing a note as a surety for an antecedent debt was not bound thereby, although the other contracting party was ignorant of his infirmity. So, where one in good faith became bail for certain prisoners, relying upon a memorandum in writing, signed by an insane person, promising to indemnify him, and the obligee having been compelled to pay the bond, brought an action on the promise, it was held that the contract could not be enforced: *Lawell v. Pinnick*, 1 Tyler, 247. To sustain an action on a note made by a lunatic, it was held in *Hicks v. Marshall*, 8 Hun, 327, that such a consideration must be shown to have been received that justice and equity would require the debt to be paid out of the lunatic's estate. For other cases of executory contracts of lunatics which the courts have refused to enforce, see *Sentance v. Poole*, 3 Car. & P. 1; *Dunnage v. White*, 1 Wils. 67; *Hall v. Warren*, 9 Ves. 605.

EXECUTED CONTRACTS.—It is a generally recognized exception to the doctrine of the invalidity of contracts of persons *non compos mentis* that, where such a contract has been entered into in good faith, for a fair consideration, without notice, or anything that would lead a prudent person to notice, of the infirmity, and has been so far performed that the parties can not be replaced *in statu quo*, it cannot be avoided. The doctrine of the cases on this subject is thus laid down by Chief Baron Pollock in *Molton v. Camroux*, 2 Exch. 502: "We are not disposed to lay down so general a proposition as that all executed contracts *bona fide* entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude that when a person apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bona fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and can not be restored so as to put the parties *in statu quo*, such contract can not afterwards be set aside by the alleged lunatic or those who represent him." A similar doctrine is held in *Dane v. Kirkwall*, 8 Car. & P. 679; *Price v. Ber- rington*, 7 Eng. L. & Eq. 254; *Loomis v. Spencer*, 2 Paige, 153; *Sprague v. Duel*, 11 Id. 480; *Beals v. See*, 10 Pa. St. 56; *Lancaster etc. Bank v. Moore*, 78 Id. 414; *Young v. Stevens*, 48 N. H. 133; *Wilder v. Weakley*, 34 Ind. 184; *Behren v. McKenzie*, 23 Iowa, 343; *Lincoln v. Buckmaster*, 32 Vt. 658; *Eaton v. Eaton*, 37 N. J. L. (8 Vr.) 108; *Matthiessen etc. Co. v. McMahon*, 38 Id. 536; *Scanlan v. Cobb*, 85 Ill. 296. But in *Seaver v. Phelps*, 11 Pick. 304, it was held that a pledge of a note was not an executed contract, and that if made while the pledgor was insane, even though the pledgee had no notice of the fact, and no

fraud was practiced, the pledgor could recover in trover. See, much to the same purpose: *Rice v. Peet*, 15 Johns. 503.

The ground of the liability in such cases, however, is not so much that the party is regarded as having made a binding contract, as that he has, by means of an apparent contract, received an advantage or benefit which he can not restore, and that it would, therefore, be unconscientious and inequitable to permit him, on being restored to reason, to avoid the apparent contract. It is the benefit received, rather than the contract, which entails the liability: *Lincoln v. Buckmaster*, 32 Vt. 652; *Matthiessen etc. Co. v. McMahon*, 38 N. J. L. (9 Vr.) 536; *Gore v. Gibson*, 13 Mees. & W. 628.

A strong case on this point is *Beale v. See*, 10 Pa. St. 56. There an insane merchant, in the ordinary course of trade, made large purchases of persons who were unaware of his condition, at fair prices and without fraud or imposition, and it was held that after receiving the goods, and after it had become impossible to restore them, he could not, by pleading insanity, avoid the contract. Gibson, C. J., delivering the opinion, says, referring to the instructions given in the court below on this point: "As to the rest of the case, the judge charged pretty much as the law is laid down in *La Rue v. Gilkyson*, 4 Pa. St. 375, in which it was said, that an insane man, like an infant, is liable on his executed contract for necessities; and in which it was intimated that he would be liable for merchandise innocently furnished to his order. Should he have made a wild and unthrifty purchase from a stranger, unapprised of his infirmity, who is to bear the loss that must be incurred by one of the parties to it? Not the vendor, who did nothing that any other man would not have done. As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. A merchant, like any other man, may be mad without showing it; and when such a man goes into the market, makes strange purchases and anticipates extravagant profits, what are those who deal with him to think? To treat him as a madman, would exclude every speculator from the transactions of commerce."

WHERE THE INSANITY IS KNOWN to the other contracting party, or where he has information which would lead a prudent man to such knowledge, the contract will not be held valid: *Lincoln v. Buckmaster*, 32 Vt. 652; *Henry v. Fine*, 23 Ark. 417; *Matthiessen etc. Co. v. McMahon*, 38 N. J. L. (9 Vr.) 536; *Lancaster etc. Bank v. Moore*, 78 Pa. St. 407; *Moss v. Tribe*, 3 Fost. & F. 297; *Beavan v. McDonnell*, 10 Exch. 184; S. C., 24 Eng. L. & Eq. 484; see *Seaver v. Phelps*, 11 Pick. 304.

ABILITY TO PLACE PARTIES IN STATU QUO.—An important point, as already intimated, which must be considered in determining whether an insane person shall be allowed to avoid or rescind his executed contract, is as to the possibility of placing the parties *in statu quo*. The rescission or avoidance of such a contract is put on equitable grounds; and it is generally held that if there has been no unfairness or imposition, or undue advantage taken, and the insanity was unknown to the other party, the contract will only be avoided upon condition that the party seeking relief will do complete equity by restoring what he has received: *Canfield v. Fairbanks*, 63 Barb. 461; *Eaton v. Eaton*, 37 N. J. L. (8 Vr.) 108; *Lincoln v. Buckmaster*, 32 Vt. 659; *Carr v. Holliday*, 5 Ired. Eq. 67; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Molton v. Camroux*, 2 Exch. 486; 1 Whart. & Stille's Med. Jur., sec. 9. But it is held in a number of cases that one seeking to avoid a contract on the ground

of insanity is not bound to restore the consideration: *Gibson v. Soper*, 6 Gray, 279; *Henry v. Fine*, 23 Ark. 417; see, also, *Foss v. Hildreth*, 10 Allen, 76.

LIABILITY FOR NECESSARIES.—It is well settled that a lunatic is liable for necessities fairly furnished suitable to his station: *Hallett v. Oakes*, 1 Cush. 296; *Kendall v. May*, 10 Allen, 59; *La Rue v. Gilkyson*, 4 Pa. St. 375; *Lancaster etc. Bank v. Moore*, 78 Id. 407; *Ex parte Northington*, 37 Ala. 496; *Sawyer v. Lufkin*, 56 Me. 308; *Van Hoon v. Hann*, 39 N. J. L. (10 Vr.) 207; *Darby v. Cabanne*, 1 Mo. App. 127; *Henry v. Fine*, 23 Ark. 417; *Tally v. Tally*, 2 Dev. & B. Eq. 385; *Richardson v. Strong*, 13 Ired. 106; *Surles v. Pipkin*, 69 N. C. 513; *McCormick v. Lüttler*, 85 Ill. 62; *In re Persse*, 3 Molloy, 94; *Baxter v. Portsmouth*, 5 Barn. & C. 170; *Nelson v. Duncombe*, 9 Beav. 211. Sometimes this liability is said to be an implied one, on the *quantum meruit*: *Hallett v. Oakes*, 1 Cush. 296; *Ex parte Northington*, 37 Ala. 496; *Surles v. Pipkin*, 69 N. C. 513; *Nelson v. Duncombe*, 9 Beav. 211. In other cases it is said that express contracts of lunatics for necessities at fair prices are binding: *Richardson v. Strong*, 13 Ired. 106; *Henry v. Fine*, 23 Ark. 417; *McCormick v. Lüttler*, 85 Ill. 62.

MARRIAGE CONTRACTS.—The insanity of one of the parties to a marriage, is said, in many cases, to render it absolutely void: *Wightman v. Wightman*, 4 Johns. Ch. 343; 1 Whart. & Stille's Med. Jur., sec. 16; Whart. Conf. of Laws, sec. 142, and see the cases collected in the note to *Wightman v. Wightman*, Ewell's Lea. Cas. 609; see, also, 1 Bish. Mar. & Div., sec. 139, *et seq.* There is, however, some conflict in the authorities as to whether such contracts are wholly void or merely voidable. The better opinion seems to be that such a marriage is void merely in the sense that it can be avoided either directly or collaterally, but that it may be ratified and confirmed so as to be valid after the party is restored to reason: See Mr. Ewell's note to *Wightman v. Wightman*, Ewell's Lea. Cas. 609; 1 Bish. Mar. & Div. sec. 139. In *Wiser v. Lockwood*, 42 Vt. 720, it was held that although such a marriage is "void," yet it constitutes a marriage in fact, so that where a woman married an insane man, who afterwards died, she was entitled to a distributive share of his estate.

CONTRACTS MADE AFTER INQUISITION.—Contracts made after one has been duly adjudged a lunatic in the manner prescribed by law, and placed under guardianship are utterly void: *Fitzhugh v. Wilcox*, 12 Barb. 235; *Wadsworth v. Sherman*, 14 Id. 169; *Pearl v. McDowell*, 3 J. J. Marsh. 658; *McCright v. Aiken*, Rice (S. C.), 56; *Leonard v. Leonard*, 14 Pic' 280; *Elston v. Jasper*, 45 Tex. 409. But not so if the guardianship has been practically abandoned, or no guardian has been appointed, or the guardian has resigned without a successor having been appointed: *Mohr v. Tulip*, 40 Wis. 66; *Elston v. Jasper*, 45 Tex. 409. A deed made by one confined in a lunatic asylum, where he seemed to have some knowledge and judgment in relation to the transaction, and it was taken by the grantees with kind motives in carrying out a compromise with his creditors, was upheld in *Selby v. Jackson*, 13 L. J. Ch. 249.

LIABILITY FOR TORT.—An insane person is liable for his personal torts, where the intent is not of the essence of the injury: *Lancaster etc. Bank v. Moore*, 78 Pa. St. 407; *Morse v. Crawford*, 17 Vt. 499, in which case the owner of a yoke of oxen bailed them to one whom he knew to be a lunatic, and the latter strangled one of them, and damages were recovered against him in an action of trover. But in a case of slander the rule is different, for there the intent with which the words were spoken is of the *gravamen* of the

charge, and insanity can be show in mitigation or by way of excuse: *Dickinson v. Barber*, 6 Am. Dec. 58; *Yeates v. Reed*, 4 Blackf. 463; *Horner v. Marshall*, 5 Munf. 466; *Bryant v. Jackson*, 6 Humph. 199.

THE PRINCIPAL CASE is frequently cited in New York as an authority on the various other points decided: *Culver v. Haslam*, 7 Barb. 322; *Newman v. Cordell*, 43 Id. 456; *Cook v. Cook*, 53 Id. 182; *Dewitt v. Barley*, 9 N. Y. 392; *Wakeman v. Dalley*, 51 Id. 31. Says Judge Cowen, in his valuable work on the procedure in justices' courts, 2 Cow. Trea. 146 (3 ed.): "The arguments of counsel and the opinion of the court in the case of *Jackson v. King*, 4 Cow. 207-221, afford, of themselves, a valuable treatise on that branch of the law which respects the defense of lunacy. The case has never, we believe, been overruled or questioned, at least by our own courts; and although the rule which it establishes in regard to the degree of derangement or imbecility of mind, which renders a party incapable of contracting, has been considered by many as too strict, and confined in its operation, yet it must be regarded as the law of the land, and entitled to the consideration of undoubted authority."

LUCID INTERVALS.—That, where general or habitual insanity has been established, one who relies upon a will or other instrument as having been executed during a lucid interval, must show that it was so executed, and that the burden of proof is on him: See *Cochran's Will*, ante, 116, and the note thereto.

REYNOLDS v. CLEVELAND.

[4 COWEN, 282.]

PARTNERSHIP UNKNOWN.—If goods be sold to, and charged against one of the members of a partnership, the existence of the partnership not being disclosed, the firm is liable to the vendor, if the goods were furnished to it and for its benefit, and this although there be an agreement in writing with the vendor signed by the individual partner only.

ASSUMPSIT against P. and S. Cleveland and S. I. Andrus, as partners, for certain millstones, at a price stated, and also on a *quantum meruit*. The defendants pleaded severally non-assumpsit, etc. It was proved, and not denied, that the defendants were partners in a mill at Rochester. It was also proved that the stones were furnished by the plaintiffs, and received by the defendants. It appeared that the negotiation for the purchase of the stones was conducted by P. Cleveland through Erastus Corning, who recommended him to the plaintiffs. Corning testified, in substance, that he was acquainted with P. Cleveland, and that the house with which he, the witness, was connected, had transacted business with the defendants as partners; that P. Cleveland came to him in January, 1820, and said he wished to get some millstones for the company at Rochester, and gave him the names of the three de-

fendants as constituting said company; that he, the witness, introduced Cleveland to Reynolds, one of the plaintiffs, and that they agreed on the size, quality and price of the stones; that the plaintiffs relied entirely upon the witness in giving credit for the stones, which would not have been given to Cleveland individually; that a written memorandum of the agreement was afterwards prepared, containing a warranty of the quality of the stones, and was forwarded by P. Cleveland to the witness to enable him to obtain said stones; that said memorandum was an agreement with P. Cleveland, and had only his signature, and was not signed by the plaintiffs, or either of them; that the witness did not know what had become of this paper, and that it had been called for by P. Cleveland, or some one for him, but could not be found. It did not appear that the plaintiffs knew anything of the partnership between the defendants, or that they knew that any one besides P. Cleveland was interested in the mill at Rochester; and there was evidence to prove that Cleveland undertook to pay for the stones, and that they were charged to him individually on the plaintiffs' books. The judge charged the jury that Corning acted as a sort of agent of both parties; that they must ascertain whether the stones were furnished under the written agreement; and that if the stones were delivered to the firm, the plaintiffs were entitled to recover. Verdict for the plaintiffs for the price of the stones, and interest, and a motion for a new trial.

H. Bleecker, for the motion.

W. Esleeck, *contra*.

WOODWORTH, J. (after briefly stating the facts): It is contended by the defendants that the contract was made with P. Cleveland individually, and that the suit ought to have been against him alone. He was the ostensible person who made the contract. It was also evident that Reynolds did not know there were other persons connected with him as partners in the mill. I presume Reynolds was satisfied as to his responsibility without making any particular inquiry. Corning says, in this instance, they relied altogether on him in giving the credit; that the credit would not have been given to P. Cleveland individually, but no communication was made to the plaintiffs respecting the partners. That the defendants were jointly concerned at the time, and that the stones were received is not questioned. From this statement, it appears to me that all the defendants are liable. A partnership is a joint undertaking to

share in the profit and loss. The defendants stood in that relation to each other, not as general partners, but as jointly concerned in erecting a mill and procuring machinery; they were partners to this extent: 1 Esp. 29, and became jointly responsible for articles purchased by one of the partners, and applied to the benefit of the concern. The law is well settled that if one partner order goods himself without disclosing the names of the other partners, and the goods be afterwards delivered to them all, they are all liable; because the delivery and the sale are considered as forming one entire contract. In such case, the one partner, who buys the goods, does not contract for himself, but on account of the partnership. This doctrine is fully recognized in the books: *Saville v. Robertson*, 4 T. R. 728; *Schermerhorn v. Loines*, 7 Johns. 311; *Muldon v. Whillock*, 1 Cowen, 390. It cannot be contended that the plaintiffs have done any act to discharge the partners. Admitting that a special contract had been signed by the plaintiffs and P. Cleveland, it would not have that effect, unless it appeared that the plaintiffs had taken him exclusively for their debtor, knowing that there were other partners.

It is also urged that the action ought to have been commenced on the special agreement in writing. I have not discovered any evidence that there was a written contract signed by the plaintiffs. The writing delivered to Corning had not their signature. It is from that fact to be inferred that Cleveland merely noted down, by way of memorandum, that Reynolds was to deliver the stones and warrant them. When Reynolds afterwards admitted that there was an agreement in writing, the presumption is he had reference to the paper delivered to Corning, for there is no legal evidence of the contents of any other. If Reynolds had in his possession a written contract, he was not called on to produce it. Without that, the defendants can not give parol evidence of the contents. But if it be admitted that there was a written contract corresponding with the statement of Reynolds, it is not a valid objection to the recovery. Where the evidence is sufficient to support the general count, supposing the plaintiff had not declared on the special agreement, he is entitled to recover without any attempt to support the agreement: 7 Johns. 36; 10 Id. 132; 4 Bos. & P. 351; 5 Mass. 391. There is no special agreement laid. Does the evidence support the general count? The plaintiffs agreed to deliver the stones for a certain price; after delivery, the defendants became liable in *indebitatus assumpsit*.

The plaintiffs might declare by a general count, in the same manner as if there had been a delivery in the first instance, and not an agreement to deliver. That part of the agreement relating to a warranty is a distinct subject. It may or may not entitle the defendants to an action to recover damages. It is not, however, so connected with the sale of the millstones, that the plaintiff's right to recover for the goods sold is in the least obstructed by the fact of a warranty. The evidence, therefore, is clearly sufficient to support the general count; for the contract was executed on the part of the plaintiffs. There was nothing more for them to perform. When the contract is executed on the part of the plaintiff, he may declare generally. The law raises a duty for which assumpsit will lie: 4 Binn. 4; 1 Cowen, 378; 1 Chit. 338; 1 Bos. & P. 397.

I am of opinion that the motion for a new trial be denied.

SUTHERLAND, J. The partnership of the defendants, at the time when the contract for the millstones was made by P. Cleveland, and also when they were delivered, is sufficiently established by the evidence; so that they were, in fact, purchased for the use of the firm, though the existence of the firm does not appear to have been known to the plaintiffs; and they were, therefore, charged to P. Cleveland only. Independent of the written special agreement, and striking that out of the case, I think it is clear that the defendants are liable. The contract was for the benefit of the firm, and within the scope of the partnership.

The partnership was in a mill, and the contract for millstones—an article of indispensable necessity in the prosecution of the business. It was a contract, therefore, which each partner had authority to make for the whole. It is then, in principle, a case of dormant partners, in which a contract within the scope of the partnership, made by the ostensible partner in his own name, is sought to be enforced against the firm. There can be no doubt of the liability of the firm in such a case. Though the goods be furnished on the credit of the ostensible partner only, the law implies a promise to pay for them on the part of all those who are entitled to share in the profits: *Saville v. Robertson*, 4 T. R. 720, 726, 728, *per* Ashurst and Buller, JJ.; *Hoare and others v. Dawes and another*, Doug. 371; *Watson*, L. P. 46, 168, 169. In *Schermerhorn v. Loines*, 7 Johns. 311, it was held that where a person supplied stores to a ship, of which there were several owners, on the order of one of them, who acted as ship's husband, and took his note in

payment, and gave a receipt in full, it was no discharge of the other owners, especially as it did not appear that the plaintiffs knew, at the time, that there were other owners; and the note not having been paid, a recovery was had against all the partners upon the original cause of action. The same principle was established in *Muldon and Montgomery v. Whillock*, 1 Cowen, 290.

But it is said the action should have been upon the written memorandum of the agreement, made at the time of the sale. What that memorandum was, is very imperfectly disclosed by the evidence. Corning, however, who is the only witness that ever saw it, swears expressly that it was not signed by Reynolds; and that it was left in the possession of P. Cleveland; and contained a warranty of the quality of the stones on the part of Reynolds; that it was sent to the witness by P. Cleveland, to enable him to obtain the stones, and forward them to the defendants. This evidence leaves it extremely questionable whether the memorandum contained any agreement whatever on the part of P. Cleveland to pay for the stones. It was left in his possession not to be signed by Reynolds, although it is said to contain a warranty on his part. It does not appear to have specified either the price or the terms of payment. It was probably no more than a memorandum on the part of Cleveland, himself, of the quality and description of the stones; and that the plaintiff had agreed to warrant them. The parties agreed upon the description and price of the stones in the presence of Corning, when Cleveland proposed that they should go and reduce it to writing; upon which they left the store of Corning; and the only evidence that they did reduce it to writing is, that P. Cleveland some time afterwards, sent the memorandum in question to the witness. It does not appear to be in the handwriting of Reynolds; and it is expressly shown that it was not signed by him. There is not a particle of evidence that he ever saw, heard of, or assented to it. I do not think that upon this evidence a jury would be warranted in saying that there was any written contract between the parties. This view of the subject disposes of the objection.

But admitting a special agreement to have been shown, everything which, so far as it appears, it imposed upon the plaintiffs to do, has been done by them. The stones were delivered to the plaintiffs, and nothing remains to be done except the payment of the consideration-money, on the part of the defendants. In such cases, the general count of *indebitatus assumpsit* is suffi-

cient, without noticing the special agreement. This subject was maturely considered by the court, and all the cases looked at in *Porter v. Tulcoll*, 1 Cowen, 359. But it is said that the special contract contained a warranty on the part of the plaintiffs; and if they had declared specially, they must have averred and shown performance on their part. If it had been averred, I apprehend the delivery of the stones to the defendants, and their acceptance of them, without complaint, would be *prima facie* evidence of a compliance with the contract in that respect. That is shown in this case. If they were not made according to contract the defendants were at liberty to show it.

Savage, C. J., concurred in the result of these opinions.

New trial denied.

Recognized as authority in *Rose v. Baker*, 13 Barb. 233; *Davis v. Groves*, 2 Rob. (N. Y.) 136.

SHUMWAY v. STILLMAN.

[4 COWEN, 302.]

JUDGMENT RENDERED IN ANOTHER STATE may be avoided in an action thereon, by showing that the court had no jurisdiction of the person of the defendant, or of the subject of the action.

JURISDICTION of the court of record of another state in which the judgment was entered is presumed.

JURISDICTION, WANT OF, HOW PLEADED.—In an action on a judgment entered in another state, it is not sufficient to plead that the defendant was never an inhabitant or resident of such state; the plea must further show that he did not appear in, or defend, the suit or otherwise subject himself to the jurisdiction of the court.

NUL TIEL RECORD is the only plea of the general issue applicable to a declaration on a judgment of a court of record of another state.

DEBT on a judgment recovered in the circuit court of common pleas at Worcester, in Massachusetts. Plea, that at the time of the commencement of the suit in which said judgment was obtained, and at the time of the rendition of judgment, and during all the time between the commencement of the suit and the recovery of judgment, the defendant was, ever since has been, and still is, an inhabitant of, and resident in, the city and county of Schenectady, state of New York. General demurrer and joinder.

B. F. Butler, in support of the demurrer, contended: 1. That *nul tiel record* was the only proper plea: *Mills v. Duryee*, 7

Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234; *Borden v. Fitch*, 15 Johns. 121, 140 [8 Am. Dec. 225]; 2. That assuming the plea in this case to be good in principle, it was insufficient in not showing that the defendant was not arrested; or did not have notice or voluntarily appear in the action.

A. C. Paige, contra, admitted that generally *nul tiel record* was the proper plea to an action on a judgment of a sister state, because the merits could not be inquired into, but he insisted that the jurisdiction in such cases might be questioned, and that the plea here was a proper one for that purpose: *Borden v. Fitch*, 15 Johns. 141-143 [8 Am. Dec. 225]; *Pawling v. Bird*, 13 Id. 207; *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88]; *Kilburn v. Woodworth*, 5 Johns. 37 [4 Am. Dec. 321]; *Robinson v. Ward*, 8 Id. 86 [5 Am. Dec. 327]; *Fenton v. Garlick*, Id. 197; *Bartlet v. Knight*, 1 Mass. 408 [2 Am. Dec. 36]; *Bultrick v. Allen*, 8 Id. 273 [5 Am. Dec. 105]; that the defendant's continued residence in New York, as averred in the plea, negatived the idea of his having been at any time within the jurisdiction of the Massachusetts court, and that if he was arrested, or voluntarily appeared, the plaintiff should reply that fact; that the declaration should have averred jurisdiction: *Kibbe v. Kibbe*, Kirby, 119; and that if the plea were defective it might be amended.

By Court, SUTHERLAND, J. The questions which arise upon the demurrer are: 1. Whether any other plea than that of *nul tiel record* can be pleaded in a case like this; 2. Admitting that it is competent to show that the court which rendered the judgment had no jurisdiction over the person of the defendant, is that fact shown with sufficient certainty by the plea in question?

The supreme court of the United States, in *Mills v. Duryee*, 7 Cranch, 481, decided that *nil debet* was not a proper plea to an action of debt upon a state judgment, prosecuted in another state; and that, in that particular case, as it was presented to the court, *nul tiel record* was the proper plea. But I do not understand the court, in the opinion delivered by Mr. Justice Story, as deciding, or intimating that *nul tiel record* is the only proper plea to such an action. The only general proposition upon the subject of pleading, which I conceive to have been established by that case is, that *nul tiel record* is the only proper general issue in an action of debt upon a state judgment; and this necessarily resulted from the conclusion to which the court came, that by the provisions of the constitution and the law of congress upon that subject, judgments of the state courts are to

be considered and treated as records. Judge Story says: "The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it can not be denied, but by the plea of *null tiel record*." And in order to show that the record in that case was of this description, that is, conclusive between the parties, he says: "In the present case, the defendant had full notice of the suit, for he was arrested and gave bail; and it is beyond all doubt that the judgment of the supreme court of New York was conclusive upon the parties in that state;" putting the conclusiveness of the judgment between the parties upon the ground that the defendant had notice of the suit, and appeared to it, impliedly admitting that the judgment would not be conclusive where the court had not acquired jurisdiction over the person of the defendant; and that in such a case *null tiel record* was not the only proper plea.

This point not having been decided by the supreme court of the United States, I can not entertain a doubt upon principle, that in an action upon a state judgment, it is competent for the defendant to show, by a special plea, that the court in which the judgment was rendered had no jurisdiction either of the subject-matter or of the person. In *Borden v. Fitch*, 15 Johns. 141 [8 Am. Dec. 225], the court say: "To give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person, and of the subject-matter; and the want of jurisdiction is a matter that may always be set up against a judgment, when sought to be enforced, or where any benefit is claimed under it. The want of jurisdiction makes it utterly void, and unavailable for any purpose." In *Andrews v. Montgomery*, 19 Johns. 162 [10 Am. Dec. 213], Chief Justice Spencer, in delivering the opinion of the court, says, that this court, in *Borden v. Fitch*, did not believe that the decision in *Mills v. Duryee*, was intended to be carried so far as to preclude the party, against whom it was rendered from showing that such judgment was fraudulently obtained, or that the court had not jurisdiction of the person of the defendant. With these qualifications, he says, we are bound by the authority of that case to consider a judgment, fairly and regularly obtained in another state, as full and conclusive evidence of the matter adjudicated. The same principle was held by Chief Justice Parsons, in *Bissell v. Briggs*, 9 Mass. 467 [6 Am. Dec. 88]. He says: "The public acts, records, and judicial proceedings contemplated by the constitution and laws of the United States, and to which full faith and credit are to

be given, are such as were within the jurisdiction of the state, whence they shall be taken. Whenever, therefore, a record of a judgment of any court of any state is produced as conclusive evidence, the jurisdiction of the court rendering it, is open to inquiry. If it should appear that the court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment." And again: "If a court of any state should render judgment against a man, not within the state, nor bound by its laws, nor amenable to the jurisdiction of its courts, if that judgment should be produced in any other state against the defendant, the jurisdiction of the court might be inquired into, and if a want of jurisdiction appeared, no credit would be given to the judgment." Against the principle of the plea, therefore, in my opinion, there is no objection; but:

Does the plea state enough to show that the court which rendered the judgment had not jurisdiction of the person of the defendant? Every presumption is in favor of the jurisdiction of the court. The record is *prima facie* evidence of it, and will be held conclusive, until clearly and explicitly disproved. Now the plea in this case may be literally true, and yet the defendant may have been personally served with process in the state of Massachusetts, may have entered special bail in the action, may have appeared and litigated the cause either in person or by attorney upon the trial, and may have been present in court when the judgment was rendered. It merely states that the defendant's domicile from the commencement of the suit until the rendering of the judgment, was in Schenectady, in the state of New York. Now, as said by Chief Justice Parsons, in *Bissell v. Briggs*, 9 Mass. 470 [6 Am. Dec. 88], an inhabitant of one state may, without changing his domicile, go into another; he may there contract a debt, or commit a tort; and while there he owes a temporary allegiance to that state, is bound by its laws, and is amenable to its courts. This plea, therefore, entirely fails in showing the want of jurisdiction in the court which rendered the judgment.

This plea was probably taken from that in *Bartlet v. Knight*, 1 Mass. 399 [2 Am. Dec. 36]. But in that case the plea contained the further allegation that the defendant, at the time of making the promise, and at the time of the recovery of the judgment, was an infant, and that case was determined on the ground that the judgment was nothing more than a foreign judgment, and liable to be impeached, not on the ground of the want of jurisdiction only, but on any other ground which showed the

plaintiff ought not to have recovered. No objection was taken to the plea on the ground that the want of jurisdiction was not sufficiently stated. The court seem to have given more weight in their judgment to the fact of infancy than the want of jurisdiction.

I am of opinion that the plaintiff is entitled to judgment, but the defendant may amend his plea.

Rule accordingly.

THIS CASE CAME AGAIN BEFORE THE COURT in 6 Wend. 447, the defendant having amended his plea in conformity with the suggestions of the foregoing opinion, so as to show that he was not arrested or served with process or other notice in the action in which the judgment was rendered, and that he did not appear therein personally or by attorney; to which the plaintiff replied that he did appear by attorney, and produced in evidence the record containing a recital of such appearance. There being no evidence offered to contradict this recital, the court held that it would be presumed to be true, and gave judgment for the plaintiff.

Savage, C. J., delivering the opinion, said: "An examination of the cases results in the establishment of the following proposition: That the judgment of a court of general jurisdiction, in any state in the union, is equally conclusive upon the parties in all the other states as in the state in which it was rendered. This, however, is subject to two qualifications: 1. If it appear by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and, 2. If it appear by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him."

The principles of these two decisions in this cause as to when and how far the judgments of one state are conclusive in the courts of another, have been approved in many subsequent cases: *Thomas v. Robinson*, 3 Wend. 269; *Starbuck v. Murray*, 5 Id. 156; *Ingalls v. Sprague*, 10 Id. 673; *Bradshaw v. Heath*, 13 Id. 416; *Foot v. Stevens*, 17 Id. 485; *Mervin v. Kumbel*, 23 Id. 295; *Reed v. Pratt*, 2 Hill, 66, per Bronson, J., dissenting; *De Witt v. Burnett*, 3 Barb. 99; *Wright v. Douglass*, 10 Id. 111; *Could v. Glass*, 19 Id. 168; *Vanbuskirk v. Warren*, 34 Id. 464; S. C., 13 Abb. Pr. 153; *Black v. Black*, 4 Bradf. 208; S. C., 4 Abb. Pr. 166; *Harrod v. Barretto*, 1 Hall, 162; *Wilson v. Niles*, 2 Id. 372; *Porter v. Bronson*, 19 Abb. Pr. 237; *Chemung Canal Bank v. Judson*, 8 N. Y. 262; *Hatcher v. Rocheleau*, 18 Id. 96; *Potter v. Merchants' Bank*, 28 Id. 653; *McCartney v. Bostwick*, 32 Id. 64; *Kerr v. Kerr*, 41 Id. 275; *Ferguson v. Crawford*, 70 Id. 257. The effect of such judgments is discussed at length in the note to *Bartlet v. Knight*, 2 Am. Dec. 42. See, on the same subject: *Rogers v. Coleman*, 3 Id. 733, and note; *Robinson v. Ward*, 5 Id. 327, and note; *Bissell v. Briggs*, 6 Id. 88; *Hanover v. Turner*, 7 Id. 206, note; *Borden v. Fitch*, 8 Id. 225; *Aldrich v. Kinney*, 10 Id. 151; *Andreass v. Montgomery*, Id. 213; *Spencer v. Brockway*, 13 Id. 615.

THE PEOPLE v. HERKIMER.

[4 COWEN, 245.]

THE PEOPLE, OR THE SOVEREIGN, are not bound by general words in a statute, restrictive of prerogative right, title or interest, unless expressly named.

ACTS OF LIMITATION AND BANKRUPTCY do not bind the king nor the people. THE PEOPLE have succeeded to all the rights of the king, the former sovereign.

PUBLIC STATUTES are judicially noticed.

ASSUMPSIT. The declaration alleged that the defendant was indebted to the plaintiffs for certain work and services performed for him at his request by the clerks of this court, and for materials furnished by the plaintiffs for said work, and that, being so indebted, he promised, etc. Plea, in substance, that after said promises, the defendant was duly discharged from all his debts, under the provisions of the act for giving relief in cases of insolvency, etc. General demurrer and joinder.

Talcott, Attorney-general, in support of the demurrer, contended: 1. That the people, being sovereign and not being specially named in said act, were not bound by a discharge under it: *People v. Gilbert*, 18 Johns. 229; 11 Co. 68; 5 Id. 14; 7 Id. 32; *Audley v. Halsey*, Sir Wm. Jones, 202; *Rex v. Pixley*, Bunb. 202; *Anon.*, 1 Atk. 262; Cooke's B. L., ch. 8, sec. 13; 2. That the plea should show that the debt accrued after the passage of the act.

O. G. Otis, contra, contended that the assignment of the defendant's effects was in trust for all his creditors, of whom the people were part; that it would be presumed that the people took the benefit of the dividend, and the discharge being thus beneficial to them, they were bound by it, though not named in the statute: 1 Bl. Com. 264; 11 Rep. 71; and that, comparing the date of the act giving clerks fees and the insolvent act, the court would take judicial notice that the indebtedness arose subsequently to the latter act.

By Court, **SAVAGE, C. J.** It is a maxim of the common law that when an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the king shall be bound by such act, though not named; but when a statute is general, and any prerogative right, title or interest would be divested or taken from the king, in such case he shall not be bound, unless the statute is

made by express words to extend to him: 11 Co. 74; Bac. Ab., Prerogative (E.), pl. 5. The acts of limitation and of bankruptcy have been held in England not to bind the king. And the same doctrine was adopted by this court in the *People v. Gilbert*, 18 Johns. 229, so far as relates to the statute of limitations. The reason of that case applies to the insolvent acts, and the same rule must prevail. That the people of the state being the sovereign, have succeeded to the rights of the king, the former sovereign, is also held in the case last cited. This disposes of the demurrer in favor of the plaintiffs. Were it necessary to decide the other question, I should incline to consider the plea sufficient, on the ground that the court are to take notice of all public acts. They, therefore, know that the law giving the clerks' fees to the people, was passed at the same session with the insolvent act. And the services must necessarily have been rendered afterwards.

Judgment for the plaintiffs.

GENERAL WORDS IN STATUTE DO NOT BIND THE SOVEREIGN. — "It is usual for the legislature in acts of restraint which they intend to bind the king, to name him expressly; and if he is not expressly named, it has always been taken heretofore that the legislature intended only to bind the subjects, and to make the act extend to them, and not to the king, for he is favored in all expositions of acts. And because it is not an act without the king's assent, it is to be intended that when the king gives his assent he does not mean to prejudice himself, or to bar himself of his liberty and privilege, but he assents that it shall be a law among his subjects. And so inasmuch as the act is made by the subjects, who, it is to be presumed, would not restrain the king, and also by the king himself, who cannot be presumed to mean to restrain himself, the expositors of acts have heretofore well collected from the intent of them, that the king should be exempted out of the general words of restraint, unless he is expressly named and restrained." *Wellion v. Berkley*, Plowd. 239, 240; *Hardcastle on Rules of Const. of Statutory Law*, 180. This rule does not mean that the king as an individual is excepted from the operation of general statutes unless specially named as to "such inferior rights as belong indifferently to the king or to a subject, such as the title to an advowson or landed estate," but that, as a sovereign, he is not, without express words, to be stripped, by an act of the legislature, "of any part of his ancient prerogative, or of those rights which are incommunicable, and are appropriated to him as essential to his regal capacity." 1 Wooddes. Lect. 31; *Hardcastle on Rules of Const. of Statutory Law*, 181.

Thus it has been adjudged that general statutes of limitation do not bind the king if not expressly named; and so of other general statutes of a like nature: *Magdalen College case*, 11 Co. 66. So it was held, in *The King v. Cook*, 3 T. R. 519, that the prerogative right of exemption from toll was not abridged by Stat. 25 George III., c. 51, sec. 4, and that the toll prescribed by that act could not be exacted from messengers carrying dispatches for the government. So the statute imposing poor rates does not apply to property occupied by or for the crown: *The Queen v. McCann*, L. R. 3 Q. B. 25; 8 C.

affirmed, Id. 677. So, in *Feather v. The Queen*, 6 Best. & S. 257, it was decided that letters patent for an invention under the Statute of Monopolies, 21 Jac. I, c. 3, sec. 6, securing the exclusive use of such invention to the patentee, did not preclude the crown from manufacturing the invention for the use of the nation, without leave of the inventor, and this decision is affirmed in *Dixon v. London Small Arms*, L. R. 1 App. Cas. 632. So it has been held that statutes prohibiting the removal of causes by certiorari, or imposing costs upon litigants, do not apply to the crown unless it is so expressed, for it is a prerogative of the king not to pay costs, and to sue in what court he pleases: *The King v. Allen*, 15 East, 333; *The King v. Inhabitants of Cumberland*, 6 T. R. 194; *The Queen v. Beadle*, 26 L. J. Mag. Cas. 111. For other illustrations of the rule as applied in the English courts, see *Tobin v. The Queen*, 32 L. J. C. P. 216; *Re Cuckfield Burial Board*, 24 L. J. Ch. 585.

APPLICATION OF DOCTRINE IN THE UNITED STATES.—On the separation of the American colonies from the mother country, and the subsequent organization of the government of the United States, the sovereignty formerly belonging to the crown was apportioned between the states and the general government, as were also such parts of the royal prerogative as appertained to the king as *parens patriæ*. It was accordingly established at an early day that neither the general government nor the several states are bound, without express mention, by general words in a statute, which trench on their respective prerogatives of sovereignty: *Swearingen v. United States*, 11 Gill & J. 373. Says Gibson, C. J., in *Commonwealth v. Baldwin*, 1 Watts, 54: "In a monarchy, the exemption of the sovereign from the operation of statutes in which he is not named, is founded in prerogative, and hence it is supposed that no such exemption can be claimed for a sovereign constituted of the people in their collective capacity. It is certain that so much of the prerogative as appertained to the king by virtue of his dignity, is excluded by the nature of our government, which possesses none of the attributes of royalty; but so much of it as belonged to him in the capacity of *parens patriæ*, or universal trustee, enters as much into our political compact, as it does into the principles of the British constitution. Why should it not do so peculiarly, where the maxim *salus populi* is the predominant principle of a government, to whose operations and well being the prerogative is as essential as to those of a monarchy?" And recurring to what is said *supra* as to the nature of this branch of the royal prerogative, it is readily seen that as it appertains not to the king's person or dignity as an individual merely, but to his regal character, to his functions as a sovereign, there is nothing inconsistent in the application of the doctrine to our state and national sovereignties.

It is not necessary, however, to resort to the doctrine of prerogative, to find ground for the application of this rule of statutory construction in the United States. Mr. Justice Story, in his opinion in *United States v. Hoar*, 2 Mason, 314, after discussing the doctrine as a part of the prerogative of sovereignty, says: "But independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear, from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and

rights of citizens, and in most cases the reasoning applicable to them applies with very different, and often contrary, force to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

Except when it is otherwise provided by express statute, it seems to be an established rule of construction of legislative acts in the United States, that general words therein will not apply to the state or nation to the material detriment of their sovereign rights or interests, unless such application appears by the language used to have been clearly intended: Sedgwick on Construction of Statutes, 337 (2 ed.). Strong, J., delivering the opinion of the court, in *Savings Bank v. United States*, 19 Wall. 239, says: "It is a familiar principle that the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies, politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests: *Magdalen College case*, 11 Co. 74; *King v. Allen*, 15 East, 333. He may even take the benefit of any particular act, though not named: 7 Co. 32; *Potter's Dwaris on Stat.* 151, 152. The rule thus settled respecting the British crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the federal courts. It may be considered as settled that so much of the royal prerogative as belonged to the king in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state, as it does into the principles of the British constitution: *Commonwealth v. Baldwin*, 1 Watta, 54; *People v. Rossiter*, 4 Cow. 143; *United States v. Davis*, 3 McLean, 483; *United States v. Williams*, 5 Id. 133; *Commonwealth v. Johnson*, 6 Pa. St. 136; *United States v. Greene*, 4 Mason, 427; *United States v. Hoar*, 2 Id. 311; *United States v. Hewes, Crabbe*, 307."

EXAMPLES OF APPLICATION OF RULE.—The exemption of the federal government, as well as of the state, from the operation of general words in a statute, where they are not particularly included, applies to all cases in which the effect of the statute would be to trench upon the rights or interests of sovereignty. Statutes of limitation afford frequent instances of the application of the doctrine. Neither the general government nor the state is bound by such a statute, unless it is expressly so provided: *United States v. Hoar*, 2 Mason, 311; *United States v. Davis*, 3 McLean, 483; *United States v. Williams*, 5 Id. 133; *Weatherhead v. Bledsoe*, 2 Overt. 357; *Commonwealth v. Johnson*, 6 Pa. St. 136; *Swearingen v. United States*, 11 Gill. & J. 373; Sedgwick on Const. Stat. 84. Nor by a statute limiting the time during which a judgment shall be a lien: *Commonwealth v. Baldwin*, 1 Watta, 54; *Joselyn v. Stone*, 28 Miss. 753. And it is held that an act abolishing imprisonment for debt does not apply to debts due the state or United States: *People v. Rossiter*, 4 Cow. 143; *United States v. Hewes, Crabbe*, 307. So a discharge of an insolvent debtor under a state insolvent law does not bind the United States with reference to debts due from the insolvent: *United States v. Wilson*, 8 Wheat. 253. Nor does an act imposing costs upon the losing party in a civil suit apply to the state without special mention: *State v. Kinne*, 41 N. H. 238. So, in *United States v. Greene*, 4 Mason, 427, it was held that the clause in the judiciary act of 1789, prohibiting the assignee of a note from bringing suit in the United States courts, where the maker and payee reside in the same state, does not apply to notes indorsed

or assigned to the United States. Again, in *Savings Bank v. United States*, 19 Wall. 227, it was decided that the provisions in the internal revenue act as to the method of proceeding in certain cases for the collection of claims did not prohibit the United States from bringing an action of debt, or other common law action for such claims, since there were no express words in the act applying it to the government.

THE LIMITATIONS OF THE RULE in this country are somewhat similar to those which restrict its application in England. Hence, it is held that acts of legislation laying down general rules of procedure in civil actions, but not impairing sovereign rights, apply equally to suits by the citizen or by the government; as a provision allowing parties in interest in civil suits to testify: *Green v. United States*, 9 Wall. 655. So, a law enacted to prevent wrong and usurpation applies to the state without express words, as where an act was passed providing a particular mode of investigation of election contests, for the purpose of securing the purity of elections: *Commonwealth v. Garrigues*, 23 Pa. St. 9. So, the state may, without special mention, have the benefit of an act passed in the interest of public justice. Thus, in a law providing a penalty for forging any public record, "with intent that any person may be defrauded," the word "person" was construed to include the state: *Martin v. State*, 24 Tex. 61.

HINCKLEY v. EMERSON.

[4 COWEN, 351.]

DOGS, LIABILITY FOR.—One who keeps a dog, having notice that it is in the habit of worrying or injuring the stock of others, is liable for the injury it commits.

DOGS, KILLING OF.—A dog which attacks persons, or kills sheep, may be killed by any one as a nuisance. It may also be killed by one on whose land it is chasing domestic animals; and, in other cases, when necessary to separate it from animals which it is attempting to kill or injure.

CERTIORARI to reverse a judgment of a justice's court obtained by the defendant in error who was plaintiff below, against the plaintiff in error, who was defendant in an action of trespass for killing the plaintiff's dog in which the general issue was pleaded and also justification because the killing was necessary to protect the defendant's property. It appeared that one of the plaintiff's witnesses set the dog on the defendant's hogs but that he did not hurt them, and that he afterwards attacked the hogs voluntarily, but was called off by the witness who took him by the ear and was leading him away, when the defendant came out with his gun. The witness let go his hold and the defendant killed the dog near his gate. It further appeared that the witness had several times set the dog on the defendant's cattle when they came under the plaintiff's shed, but was told by the plaintiff to be careful that he did not injure them. The defendant offered to show, in bar, that the dog had habit-

ually worried his cattle, hogs, etc., on his premises with the plaintiff's knowledge, but the justice decided that such evidence could not defeat the action though it might mitigate the damages.

W. L. F. Warren, for the plaintiff in error.

W. Metcalf, *contra*.

By Court, **WOODWORTH, J.** If the plaintiff's dog had worried or injured the defendant's cattle on his land, an action would lie, if the plaintiff had previous notice that his dog was in the habit of being thus vicious. But except in the case of worrying or killing sheep, a case provided for by statute (1 R. L. 169), I do not know that any one beside the master has a right to kill the dog. It seems to be law, that where a dog chases and kills one's domestic animals on his land, he may kill the dog. *Wadhurst v. Damme*, Cro. Jac. 45; *Barrington v. Turner*, 3 Lev. 28. But if the dog merely bites or chases an animal, in order to justify killing the dog, it is necessary to show that he could not otherwise be separated: *Wright v. Ramscott*, 1 Saund. 84. But where a dog is ferocious and attacks persons, he may be killed, being considered a nuisance: *Putnam v. Payne*, 13 Johns. 312. The statute, allowing dogs that attack sheep to be killed, recognizes the common law doctrine as above laid down. And *vide Brook v. Copeland*, 1 Esp. 203; *Boulton v. Banks*, Cro. Car. 254; *Kinnion v. Davies*, Id. 487. The judgment must be affirmed.

Judgment affirmed.

McKEE v. NELSON.

[4 COWEN, 356.]

OPINIONS OF WITNESSES are admissible in an action for breach of marriage contract, if founded upon observation, to show whether plaintiff was attached to defendant.

WANT OF CHASTITY, or other immoral conduct, on the part of the plaintiff, may be shown by the defendant in an action for breach of contract to marry.

ACTION for breach of promise of marriage. At the trial the promise was proved, and also the defendant's refusal to execute it. Several witnesses for the plaintiff expressed their opinions from what they observed, that the plaintiff was much attached to the defendant, and no objection was made. Afterwards, the plaintiff's counsel asked certain relatives of the plaintiff

whether, living in the same house and constantly associating with her as a member of the family, and observing her deportment during courtship at the time of the defendant's desertion, they were of opinion that the plaintiff was sincerely attached to the defendant. The defendant objected, but the objection was overruled, and the defendant excepted. The defendant called his father as a witness and asked him whether, after the promise, and before the breach, he and the defendant's mother did not remonstrate with the defendant against the marriage, and what reasons, if any, they assigned. The plaintiff objected, and the judge decided that the question might be asked whether the defendant's father and mother remonstrated against the marriage, but not as to the reasons or any particular facts affecting the plaintiff's moral character, unless the witness had personal knowledge of their truth; to which decision the defendant excepted. Verdict for the plaintiff; and motion for a new trial, which the plaintiff moved to bring to a hearing as frivolous.

D. Graham, for the plaintiff.

G. Griffin, for the defendant.

By COUNSEL. We think the judge's decision founded in good sense, and in the nature of things. We do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded, are capable of specification, so as to leave it like ordinary facts, as a matter of inference to the jury. It is true, as a general rule, that witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we think this one of them. There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify. The opinion of witnesses, on this subject, must be derived from a series of instances passing under their observation, which yet they could never detail to a jury. Were there nothing more in the case, therefore, we think there is no ground for the bill.

But we are not left to this ground. The objection came too late. It was certainly waived. The same opinion had been repeatedly expressed, in the same manner, in the course of the trial, by different witnesses, without any sort of objection. Just as the trial is drawing to a close, on these questions being put, the objection is made for the first time. The answer would have been a mere iteration of what had passed without objection, at intervals, during the whole previous course of the trial.

At least, under the circumstances, it was altogether immaterial. It could not change the complexion of the case. The answer of the father as to the particular facts was also clearly inadmissible. Want of chastity or immoral conduct may be shown, but it is matter of proof. The effect of allowing the father to answer as to particulars, might have been, by a side wind, to get that in which was untrue, resting merely in conjecture, and thus to work a prejudice in the mind of the jury. This can not be tolerated. A new trial must be denied.

Rule accordingly.

THE SOUNDNESS OF THIS DECISION as to the admissibility of opinions of witnesses, who have had sufficient opportunities for observation of the demeanor and conduct of a party, respecting the state of the affections of such party, where that fact is material, is generally admitted by the New York courts, and the case is often referred to as constituting a recognized exception to the general rule that witnesses can only testify to facts: *Murray v. Bethune*, 1 Wend. 197; *Gibson v. Williams*, 4 Id. 326; *Norman v. Wells*, 17 Id. 163; *Cutter v. Haslam*, 7 Barb. 326; *Eastwood v. People*, 3 Park. Crim. 57; *Joy v. Hopkins*, 5 Denio, 84; *Clark v. Baird*, 9 N. Y. 187; *Desoitt v. Barley*, Id. 388, per Denio, J., dissenting; S. C., 17 Id. 344, per Selden, J.; *Rochester etc. R. R. Co. v. Budlong*, 10 How. Pr. 293. As was well said in the case last cited, this exception is necessary for the reason that the facts upon which such opinions are based are of such a character that it would be practically impossible for the witnesses to state them to the jury. The principal case is referred to, also, as authority, with respect to allowing damages for wounded feelings in actions of this kind, in *Stiles v. Tilford*, 10 Wend. 340, and as to the admissibility of evidence of remonstrance of parents in mitigation of damages, in *Johnson v. Jenkins*, 24 N. Y. 256.

EX PARTE LAWRENCE.

[4 COWEN, 417.]

LEVY ON PERSONALTY sufficient to satisfy a writ of execution extinguishes the judgment, destroys the judgment-lien, and terminates the judgment-creditor's right to redeem the property of his debtor.

MOTION for a mandamus. The facts were: One Toll having a judgment against Chandler bought in certain land of the said Chandler under a *fi. fa.* Lawrence being the assignee of a junior judgment against Chandler, and one Hopping sued out a *fi. fa.*, and made part of the money by a sale of Chandler's personal property, and levied on Hopping's personal property to an amount sufficient to satisfy the execution, and took a receipt for it, but had the sale delayed from time to time, until August, 1824, when he applied to the sheriff as a judgment-creditor of Chandler to redeem the land sold to Toll. The sheriff denying

his right to redeem, refused to receive the money or make a conveyance; and subsequently sold Hopping's personal property and collected the residue of Lawrence's *fi. fa.*, pursuant to his directions. This motion was afterwards filed for a mandamus to compel the sheriff to convey to Lawrence the land sold to Toll.

G. Lawrence, for the motion

B. D. Noxon, *contra*.

By COURT. Clearly this motion must be denied. The levy on the personal property of Hopping to an amount sufficient to satisfy Lawrence's execution operated *per se* as an extinguishment of his judgment. This has been often held: *Clerk v. Withers*, 2 *Ld. Raym.* 1072; 1 *Salk.* 322; *S. C. Ladd v. Blunt*, 4 *Mass.* 403; *Hoyt v. Hudson*, 12 *Johns.* 207; *Reed v. Pruyn & Staats*, 7 *Id.* 428, 429 [5 *Am. Dec.* 287]. Lawrence's judgment ceased to be a lien from the time of the levy, and of course he could not redeem: *Matter of Hurd*, 3 *Cowen*, 85; *Matter of Marsh*, *Id.* 69.

Motion denied.

APPROVED in *Wooster v. Burr*, 2 *Wend.* 298; *Wood v. Torrey*, 6 *Id.* 563; *Alderman v. Share*, 7 *Id.* 221; *Every v. Edgerton*, *Id.* 262; *Shepard v. Rowe*, 14 *Id.* 262; *Miller v. Smith*, 16 *Id.* 445; *Miller v. Adsit*, *Id.* 351; *Green v. Burke*, 23 *Id.* 499; *Post v. Arnot*, 3 *Denio*, 355; *Chapman v. Fuller*, 7 *Barb.* 73, citing *People v. Hopson*, 1 *Denio*, 574, *as contra*; *Denorey v. Fox*, 22 *Barb.* 524; *Heebner v. Townsend*, 8 *Abb. Pr.* 237; *Voorhees v. Gros*, 3 *How. Pr.* 263.

FARLEY v. CLEVELAND.

[4 COWEN, 432.]

PROMISES TO ANSWER FOR THE DEBT OF ANOTHER classified, and each class considered with respect to the statute of frauds.

PROMISE TO PAY THE DEBT OF ANOTHER is, if founded on a new consideration of benefit to the promisor or harm to the promisee, moving from either the promisee or the original debtor, not within the statute of frauds.

ERROR to the common pleas. The action was brought by the plaintiff in error, who was also plaintiff below, on a special promise of the defendant to pay the note of one Moon, due to the plaintiff, in consideration of certain hay sold and delivered by Moon to the defendant. At the trial the plaintiff offered to prove the note and that after it became payable the defendant promised to pay it, in consideration that Moon would deliver to him a cer-

tain quantity of hay; that the hay was delivered; that in consideration thereof the defendant promised the plaintiff by parol to pay Moon's note; and that Moon had absconded. The court below nonsuited the plaintiff on the ground that this being a promise to pay the debt of another, and not being in writing, was void by the statute of frauds; whereupon the plaintiff brought error.

D. Russell, for the plaintiff in error, contended that the delivery of the hay was a new consideration and took the case out of the statute, and he relied on *Schermerhorn v. Vanderheyden*, 1 Johns. 139 [3 Am. Dec. 304], and cases cited. He also cited: *Leonard v. Vredenburg*, 8 Johns. 29 [5 Am. Dec. 317]; *Skellon v. Brewster*, Id. 376; *Myers v. Morse*, 15 Id. 425; *Chaplin v. Rogers*, 1 East, 192; *Hinde v. Whitehouse*, 7 Id. 558; *Stadt v. Lill*, 9 Id. 348; *Elmore v. Stone*, 1 Taunt. 457; Rob. on Frauds, 232.

J. Willard, *contra*, insisted that as the liability of the original debtor was not extinguished the promise of the defendant to pay the debt was collateral and, therefore, within the statute: *Simpson v. Patten*, 4 Johns. 422; *Jackson v. Rayner*, 12 Id. 291; *Leonard v. Vredenburg*, 8 Id. 29 [5 Am. Dec. 317]; *Fish v. Hutchinson*, 2 Wils. 94.

By Court, SAVAGE, C. J. That part of the statute which relates to this case is as follows: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing," etc. Our statute is a transcript of the 29 Ch. II. The English decisions, therefore, upon that statute are entitled to consideration. We have been referred to several, before noticing which, the three classes of cases mentioned by Kent, C. J., in *Leonard v. Vredenburg*, 8 Johns. 29 [5 Am. Dec. 317], should be attended to. These are: 1. Where the promise of the defendant is collateral to the principal promise, but made at the same time; 2. Where the collateral promise was subsequent to the original indebtedness and was made upon no other consideration but the liability of the original debtor; 3. Where the promise arises out of some new consideration of benefit or harm moving between the newly contracting parties, or as expressed by Mr. Roberts (Rob. on Frauds, 232): "If it spring out of any new transaction, or move to the party promising upon some fresh and substantive ground

of a personal concern to himself." The first class needs no other consideration than the original debt to which it is collateral; the second does; and the third is not within the statute at all. In the two first cases the consideration must be in writing, as well as the promise; in the third, all may rest in parol, as in ordinary cases.

Buckmyr v. Darnall, 2 Ld. Raym. 1085, belongs to the first class. The defendant had promised the plaintiff to return his horse, if he would let him to one English to ride to Reading. This was held to be collateral, because English was liable on the original bailment; and hence it must be in writing. So also, in *Jones v. Cooper*, Cowp. 227, the promise was to pay the plaintiff if the debtor did not, which was clearly within the statute. In *Matson v. Wharam*, 2 T. R. 80, the defendant applied to the plaintiff to sell goods to one Coulthard, and said, "I will see you paid." This was held to be void, being merely by parol. In *Anderson v. Hayman*, 1 H. Bl. 120, the defendant said: "Use my son well; charge him as low as possible, and I will be bound for the payment of the money as far as eight hundred pounds or one thousand pounds." The goods were charged to the son. The promise was held to be collateral and void, being by parol.

In this court, the case of *Leonard v. Vredenburgh*, as decided, belongs to the third class. The defendant promised in writing to guaranty a note of one M. Johnson for five hundred dollars, on which the guaranty was written. The case of *Fish v. Hutchinson*, 2 Wils. 94, belongs to the second class. The plaintiff had sued one Vickers, and the defendant in consideration that the plaintiff would stay his action, promised to pay him the money owing to him by Vickers. The court decided this promise to be within the statute, as the original debt was still subsisting. So, also, in the case of *Jackson v. Rayner*, in this court, 12 Johns. 291, the defendant in the court below promised the plaintiff below (who had sued the defendant's son), that he, the defendant, would pay the debt, as he had taken his son's property, and meant to pay his honest debts. The court decided that a promise in writing was necessary; and emphasized the fact that the original debt of the son was still subsisting. This case was decided on the authority of *Simpson v. Patten*, 4 Johns. 222, which will be hereafter noticed.

The third class, mentioned by Kent, C. J., as not within the statute, has been illustrated by the following cases: In *Read v. Nash*, 1 Wils. 305, one Tuack, the plaintiff's testator, had sued one Johnson for an assault and battery, and the cause being at

issue, the defendant promised that if Tuack would withdraw the record, he would pay him fifty pounds and the costs. This was held an original promise, and that there was no debt, default, or miscarriage. In *Williams v. Leper*, 3 Burr. 1886, the plaintiff was proceeding to distrain the goods of one Taylor, his tenant, for three quarters' rent, being forty-five pounds, when the defendant, who was agent for Taylor's creditors, to sell the goods under an assignment of them, promised the plaintiff to pay the rent in arrear, if he would desist from distraining. It was contended that this promise should have been in writing, and that Taylor still remained liable till actual satisfaction. Lord Mansfield said the landlord had a legal pledge; he had a lien upon the goods, and that the statute did not apply. The case of *Simpson v. Patten*, 4 Johns. 222, came here on certiorari. Patten had sued Simpson in the court below on a promise that if he, Patten, would forbear to sue one J. S., Simpson would pay the amount of J. S.'s note, as soon as he could sell an acre of land of J. S., which he, Simpson, was authorized to sell. Simpson had sold the land, and a recovery was had on the parol promise. This court reversed the judgment, saying that a promise to pay the debt of a third person must be in writing, notwithstanding it is made on sufficient consideration. They said nothing about this promise being an original undertaking. In support of their opinion, they cite some of the above cases, and *King v. Wilson*, 2 Str. 873, where Raymond, C. J., held that a parol promise to pay the debt of another, in consideration of forbearance, was void by the statute of frauds and perjuries.

In the cases of *Simpson v. Patten*, and *Jackson v. Rayner*, there was a good consideration, that of indefinite forbearance, and in both cases, funds of the original debtor were placed in the hands of the defendants, by which they had the means of performing their promises; but the original debt was still subsisting. The case of *Slingerland v. Morse*, 7 Johns. 463, was very much like the case of *Williams v. Leper*. The plaintiff had distrained the goods of his tenant, and the defendants promised in writing to deliver them six days after demand, or pay four hundred and fifty dollars. It was contended that the writing should have contained a consideration, according to *Sears v. Brink*, 3 Johns. 210 [3 Am. Dec. 475], considering the case as within Chief Justice Kent's second class; but the undertaking was held to be original. The plaintiff had a lien which he relinquished; and as this took the case out of the statute, no

writing was necessary. *Skelton v. Brewster*, 8 Johns. 376, came here on certiorari. Brewster had levied on the property of one W. S., by virtue of an execution. W. S. delivered all his goods to Skelton, who, in consideration of this, and that the plaintiff would discharge W. S. from the execution, promised to pay twenty-five dollars. In this case, the court said: "The promise of the defendant below to pay the judgment against a third person was founded on a new and distinct consideration, which was the delivery of the goods of such person, and the plaintiff's discharge of the judgment;" and they held it an original promise.

This case differs from *Simpson v. Patten*, and *Jackson v. Rayner*, in no essential particular, except that in those cases, the original debtor remained liable. In this case, he was discharged. In those cases, the promises were held to be within the statute; in this, not. It would seem, therefore, that the liability of the original debtor was a controlling fact. But in *Gold and Sill v. Philips*, 10 Johns. 412, the liability of the original debtor was overlooked, or not deemed important. In that case, the plaintiffs had a demand against one Aaron Wood. Wood sold his farm to the defendants, and they agreed to pay Wood a certain sum. The rest of the consideration was composed of Wood's debts, which the defendants agreed to pay; and among them was the demand of the plaintiffs. The defendants wrote to the plaintiffs as follows: "Gentlemen, an arrangement has been made between us and Aaron Wood, by which we are to be accountable to you for the balance due from him to you on account." The court say: "The promise of the defendants was not within the statute of frauds. It has no immediate connection with the original contract, but was founded on a new and distinct consideration. The distinction noticed in *Leonard v. Vredenburg*, applies to this case, and takes it out of the statute. The defendants made the promise in consideration of a sale of lands made to them by Wood, and they assumed to pay the debt of the plaintiffs, as being by arrangement with Wood, part payment of the purchase-money. Here was a valid assumption of the debt of Aaron Wood." In this case, the original debtor was not discharged, and the property purchased of Wood had passed to another person who had made a similar promise.

In the case of *Myers v. Morse*, 15 Johns. 425, the plaintiffs were liable as indorsers of one H. M. They also held a note drawn by H. M., and indorsed by the defendant, on which he

was liable. It was agreed by the plaintiffs that they would not hold the defendant liable on the note held by them, in consideration whereof he promised to indemnify the plaintiffs against one third of any loss which they might sustain as indorsers of H. M. This was held to be an original promise, founded upon the new consideration moving between the newly contracting parties. The case of *Olmsted v. Greenly*, 18 Johns. 12, was this: The plaintiff was liable as indorser for B. and H., for one thousand dollars. B. owed the plaintiff one hundred and fifty dollars, and it was agreed between the plaintiff, defendant and B., that B. should place in the defendant's hands, in cash, six hundred dollars; and in goods, one thousand five hundred dollars; and that the defendant should pay the note indorsed by the plaintiff and indemnify him against all damages and costs by reason of that indorsement; and should also pay the plaintiff the debt due him from B. The plaintiff averred that B. had the money and goods; and that the plaintiff caused them to be put in the defendant's hands for the purpose mentioned. The court said this is not a case within the statute of frauds. It is not a mere collateral undertaking on the part of the defendant to pay the debt of Bristol, but was an original contract on an independent consideration received by the defendant by the procurement of the plaintiff. The plaintiff has the same ground of action as if he had delivered his own goods to the defendant as the consideration of the promise.

These cases do not entirely agree, unless they are distinguishable by the circumstance that in some of them, forbearance to sue the original debtor is the whole or a principal part of the consideration for the promise; and in the others, the whole consideration is something new, moving to the party making the promise. Thus, in *Simpson v. Patten*, and *Jackson v. Rayner*, the promise was founded as well upon the forbearance of the plaintiffs to sue the original debtor, as upon property of the debtor being placed in the hands of the defendants, out of which the debts might be paid; but in the cases of *Gold v. Philips*, *Myers v. Morse*, and *Olmsted v. Greenly*, no allusion is had to the effect to be produced upon the original debtor. The promise in those cases was predicated upon value received by the defendants, either from the plaintiffs or the original debtor. The case under consideration is, in principle, very much like the case of *Gold v. Philips*. The defendant had, in that case, purchased land of the original debtor, which was the consideration moving to the defendant. In this the defendant par-

chased hay, which was the consideration moving to him. So, too, in *Olmsted v. Greenly*, the original debtor placed money and goods in the defendant's hands, with which he promised to make certain payments and to pay the plaintiff's debt. It was averred that this was done by the procurement of the plaintiff, which is the only difference between that case and this, if the hay was not absolutely sold by Moon to the defendant. In all these cases, founded upon a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original debtor, the subsisting liability of the original debtor is no objection to the recovery.

I am, therefore, of opinion that the court below erred; that the judgment be reversed, and a *venire de novo* awarded.

Judgment reversed.

THIS DECISION WAS AFFIRMED BY THE COURT OF ERRORS in *Cleveland v. Farley*, 9 Cow. 639, and has been approved in many subsequent cases in New York on the point as to when a parol promise to pay another's debt will be held valid: *Ellwood v. Monk*, 5 Wend. 237; *Meech v. Smith*, 7 Id. 318; *Marquand v. Hipper*, 12 Id. 520; *Royers v. Kneeland*, 13 Id. 122; *Watson v. Randall*, 20 Id. 201; *Barker v. Bucklin*, 2 Denio, 45, where Jewett, J., said that "the case was well decided," but that "a wrong reason was given for it," and held that the true ground of the decision was that the promise was in effect to pay the defendant's own debt: *Blunt v. Boyd*, 3 Barb. 212; *Kingsley v. Balcome*, 4 Id. 133; *Mallory v. Gillett*, 23 Id. 616, S. C., 21 N. Y. 419. (It was said, however, by Wells, J., in deciding the latter case in the supreme court, 23 Barb. 616, that *Farley v. Cleveland* could not "be upheld upon any other principle" than that the defendant merely promised to pay his own debt): *Barnes v. Perine*, 15 Barb. 253; *Hale v. Boardman*, 27 Id. 85; *Seaman v. Hasbrouck*, 35 Id. 155; *State Bank v. Mettler*, 2 Bosw. 398; *Connor v. Williams*, 2 Rob. 49; *N. Y. etc. R. R. Co. v. Gilchrist*, 16 How. Pr. 566; *Stern v. Drinker*, 2 E. D. Smith, 404; *Phillips v. Gray*, 3 Id. 70; *Stoddard v. Graham*, 23 How. Pr. 532; *Brown v. Curtis*, 2 N. Y. 234. The subject of the validity of such promises is discussed, and many of the authorities examined in the note to *Leonard v. Vredlenburgh*, 5 Am. Dec. 321.

The following decisions approve the principal case on the point, that one for whose benefit a promise is made may sue upon it: *Delaware etc. Canal Co. v. Westchester Co. Bank*, 4 Denio, 98; *Judson v. Gray*, 17 How. Pr. 295; *Lawrence v. Fox*, 20 N. Y. 270; *Dolph v. White*, 12 Id. 300; *Vrooman v. Turner*, 69 Id. 285. See, on this subject, *Schermerhorn v. Vanderheyden*, 3 Am. Dec. 304 and note; *Arnold v. Nyman*, 9 Id. 154 and note; *Tuttle v. Catlin*, 12 Id. 691 and note.

BARNES v. GRAHAM.

[4 COWEN, 452.]

TENDER OF PONDEROUS ARTICLES, where the contract designates no place, should be made by seeking the obligee before the day appointed, inquiring where he will have them delivered, and then delivering them at the place by him designated, if he appoint a reasonable place and one within the probable contemplation of the parties. The articles tendered must be separated from other articles so that the promisee can know which to take.

ERROR to the common pleas. Graham brought assumpsit on a note signed by Barnes, and dated at Italy, October 26, 1822, promising to pay him, Graham, or bearer, a certain sum "in good merchantable lumber, and equal proportion clear stuff, in one year from the fifteenth day of May" following, with lawful interest, "said lumber to be of good white pine timber." The defendant offered to prove that when the note fell due he had a sufficient quantity of lumber of the quality described to satisfy the note, at his mill in Italy, where both parties lived, though it was in bulk and not sorted or separated from other lumber, but that the plaintiff did not call to demand it. On objection the evidence was excluded as not amounting to proof of a tender. Verdict and judgment for the plaintiff, whereupon the defendant sued out this writ of error.

P. S. Parker and A. P. Vosburgh, for the plaintiff in error, contended: 1. That as both parties resided in Italy, and no place of payment was specified, the plaintiff should have made a demand at the defendant's mill; 2. That no place of payment being specified, it should have been left to the jury to determine from the circumstances whether it was not the understanding when the contract was made, that the lumber should be received at the mill, citing Chipman on Contracts, 24, 25; *Coil v. Houston*, 3 Johns. Cas. 243; *Slingerland v. Morse*, 3 Johns. 474; 2 Poth. on Ob. (Newbern ed. 1802), pt. 3, page 28, art. 3.

W. M. Oliver and H. A. Wisner, contra, insisted: 1. That no place of payment being named, a tender should have been made at the payee's house, or at the place of making the note, or that the maker should have called upon the payee and requested him to name a convenient place: Chipman on Contracts, 26, 28; 9 Johns. 477; Cowen's Treat. 483, and cases cited; 2. That if the mill was the proper place, the lumber should have been measured and separated, the effect of a proper tender being to pass the title in the property to the payee: 8 Johns. 477; 15 Id. 351;

Cowen's Treat. 479; *Coit v. Houston*, 3 Johns. Cas. 243; 7 Johns. 124; 5 Id. 119.

By Court, SAVAGE, C. J. The court below decided correctly. When a note is payable in ponderous articles, and no place is designated, the law does not seem to have perfectly settled the place. In *Slingerland v. Morse*, 8 Johns. 477, this court appear to adopt the doctrine of Lord Coke (Co. Lit. 210 b), that in such case, the obligor must seek the obligee before the day, and know where he will appoint to receive them, and there they must be delivered; yet, they hold that the obligor is not bound to deliver the articles at an unreasonable place.

In this case, the defendant below made no effort of that kind, nor did he separate the property he intended to tender in payment of the note. Suppose, the night after the note fell due, a fire had consumed all the lumber at the mill; must the payee have lost it to the extent of his demand? How could he know which part to preserve, had he been present at the fire? The defendant below should, before the day of payment, have called on the plaintiff to know where the lumber should be delivered, and then have actually delivered it there, if the delivery at that place would have been reasonable and within the probable contemplation of the parties, when the note was given, as at the plaintiff's house in the same town, where he might wish to use the lumber, though the defendant ought not to be obliged to carry it to market for the plaintiff; but the defendant did not do enough, even if the lumber had been payable at his mill. He should have counted it out, having regard to the quality of the lumber specified in the contract.

Judgment affirmed.

TENDER OF SPECIFIC ARTICLES.—As to what constitutes a sufficient tender of specific articles, and its effect, see note to *Barney v. Bliss*, 12 Am. Dec. 700. As to the place of tender, see the note to *Bates v. Bates*, Id. 573.

DAN v. BROWN.

[4 COWEN, 483.]

WILL—THE PROOF OF THE EXECUTION of a will may be made by one of the subscribing witnesses only, although the will be lost, and the witness has forgotten the name of one of the other subscribing witnesses.

DECLARATIONS OF A TESTATOR, regarding the cancellation of a will, are inadmissible if not connected with any act done or attempted by him, to effect a revocation.

PAROL EVIDENCE OF THE CONTENTS OF A WILL is inadmissible, unless it is first shown that diligent and unavailing search has been made for the original, by or at the request of the party interested, and in the place where it is most likely to be found.

ADMISSIONS MADE BY ONE PLAINTIFF are not evidence against his co-plaintiffs who claim as tenants in common with him.

PETITION for partition; the plaintiffs, Thaddeus Dan, Jared Betts and others, claiming to be tenants in common as co-heirs, with the defendants, of Benajah Brown, deceased, who died seised. Plea, *non tenent insimul*, with a notice that the said Benajah Brown, by his will, devised the premises to the defendants. The execution of the will was proved by William L. Marcy, who drew it and attested it as a subscribing witness, and who testified that all the requisites of the statute were complied with; that James Mallory also subscribed it as a witness, but that he could not recollect the name of the third witness, though he had no doubt that he was a credible witness, or that he, Marcy, was satisfied of that fact at the time, as the testator depended upon him to see that the will was properly executed. Mallory also testified to the execution of the will, and that it was left in his possession, but that the testator subsequently called for it and took it away with him, saying he wished to add a codicil to it. The will was not recorded, and the defendants claimed that it was lost. To prove that fact, and also that due search had been made for the will, the defendants relied upon certain admissions made by Jared Betts, Harvey Betts and Thaddeus Dan, the substance of which is stated in the opinion, and upon certain statements made to the surrogate and to the witness, Mallory, by James Brown, to the effect that the testator, a few days before his death, had informed him, Brown, that the will was in his desk at Brunswick, but that he, Brown, had hunted for it among the papers in the desk, but could not find it. Other evidence on this point is stated in the opinion. The defendants were permitted, against the objection of the plaintiffs, to prove the contents of the will by parol. Verdict for the defendants, and a motion for a new trial.

J. Payne and A. Spencer, for the motion, claimed: 1. That the execution of the will was not sufficiently proved, because it did not appear who the third witness was, or that he was a credible witness: 1 Phil. Ev. 377 (Am. ed. 1820), and note (b); *Jackson v. Le Grange*, 19 Johns. 386 [10 Am. Dec. 237]; 2. That the testator's declarations in his last illness were not admissible to prove the execution of the will or to rebut the presumption

that he had destroyed it: *Jackson v. Kniffen*, 2 Johns. 31 [3 Am. Dec. 390]; Rob. on Frauds, 307; *Doe v. Perkes*, 3 B. & A. 489; 2 Phil. Ev. 196, 197; *Wilson v. Boerem*, 15 Johns. 286; *Rea v. Morton*, 4 Mau. & Sel. 48; 3. That if the will was destroyed before the testator's death it ceased to be a will: Roberts on Wills, 21; *Lawrence v. Kete*, Alleyn, 54; *Havard v. Davis*, 2 Binn, 406; 1 Eq. Cas. Ab. 402; 4. That there was no sufficient proof of the loss of the will: *Gray v. Pentland*, 2 Serg. & R. 23; *Jackson v. Root*, 18 Johns. 60; 1 Phil. Ev. (Am. ed. 1820), 346; *Williams v. Younghusband*, 1 Stark. 139. They also cited *Pemberton v. Pemberton*, 13 Ves. 290; *Burthenshaw v. Gilbert*, Cowp. 49; Gilb. on Dev. 115.

J. P. Cushman and *A. Van Vechten*, *contra*, contended: 1. That the execution of the will was well proved: *Jackson v. Le Grange*, 19 Johns. 388 [10 Am. Dec. 237]; *Bond v. Seawell*, 3 Burr. 1773; *Hands v. James*, Com. 531; 8 Vin. 125, Will (N. 7); 2. That there was sufficient proof of the loss: *Livingston v. Rogers*, 1 Cai. Cas. 27; *Jackson v. Lucett*, 2 Cai. 365; *Jackson v. Hasbrouck*, 12 Johns. 192; *Jackson v. Frier*, 16 Id. 193; *Caufman v. Presbyterian Congregation*, 6 Binn. 59; 3. That there was no evidence of revocation: *Bibb v. Thomas*, 2 W. Bl. 1044; *Brady v. Cubit*, 2 East, 534, and note (a); 4. That it was not necessary, as claimed on the other side, that the will should have been in existence at the testator's death: Shep. Touch. 411; *Goodright v. Harwood*, 3 Wils. 512; *Havard v. Davis*, 2 Binn. 406.

By COURT, WOODWORTH, J. The will of Benajah Brown was proved by one of the subscribing witnesses. He stated that it was executed in the presence of himself, James Mallory, and another person, whose name he did not recollect; but he had no doubt of his being a credible witness. This was all the evidence that could be expected under the circumstances of the case. It was *prima facie* sufficient. In the case of *Hands v. James*, Com. 531, where all the witnesses were dead, it was submitted to the jury, to determine whether the witnesses to the will set their names in the presence of the testator merely upon the circumstances without any positive proof; upon the ground that there could not probably be any express proof, as few are usually present besides the deviser and witnesses, and from the nature of the case, the proof must be circumstantial. It was observed that three witnesses had set their names; and it must be intended that they did it regularly; that one witness was an attorney of good character, and may be

presumed to understand what ought to be done rather than the contrary. Here the attorney drew the will, subscribed it as a witness, and testifies to everything but the name of the third witness. It seems to me, that from this, the presumption of due execution is irresistible.

The execution of the will being established, the next question is, whether there was any evidence that it was canceled. On this point I lay no stress upon the declarations of the testator. They were made long after the execution of the will, and shortly before his death. They are not evidence, unless they relate to the *res gesta*, or to an act done; as where, by mistake, the will is torn or thrown into the fire. The declarations of the testator are, in such cases evidence, where they show the *quo animo*: 12 Johns. 33. The act of canceling is, in itself, equivocal, and will be governed by the intent. The rule is, that if the testator lets the will stand until he dies, it is his will; if he does not suffer it to do so, it is not his will. It is ambulatory until his death: 4 Burr. 2514. There must be a canceling *animo revocandi*. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation. The statute has prescribed four. If any of them are performed in the slightest manner, joined with a declared intent to revoke, it will be an effectual revocation: 2 W. Bl. 1044. The evidence here does not warrant any such intent. The testator, several months before his death, called for the will, and wished to add a codicil. There is no other act that indicates an intent to make the least alteration. No act was done or dissatisfaction expressed upon which to raise a presumption. The most that can be urged is that the testator expressed a desire to make some alteration by way of codicil, from which it is rather to be inferred that the general features of the will were approved, and that an additional or greater provision was contemplated for some of the objects of his bounty. The conclusive answer is, that all this was inchoate. It rests merely in an intent expressed at one time and to a single individual. We are left entirely to conjecture whether the testator ever afterwards did a single act to warrant the presumption of canceling the will, in whole or in part. I, therefore, consider the will as remaining in force at the testator's death.

The more important question is, whether it sufficiently appears that there has been diligent search for the will where it was most likely to be found, so as to warrant the introduction of secondary evidence. The general rule is that to entitle a

party to give parol evidence of the contents of a will, when there is not conclusive evidence of its destruction, it must be shown that diligent search had been made in those places where it would most probably be found: 12 Johns. 192. In examining this question, I will first consider the place where the will was most likely to be found. The will not having been recorded, no resort need be had to a public office. It is last traced to the hands of the testator, who resided in Brunswick. His desk and other papers were there. He died from home on a visit to his children in Westchester. I think the defendants are bound to show due search among the papers of the deceased, at his usual place of residence; and if on such search the will can not be found, parol evidence is admissible. James Brown might have been examined as a witness to the court on this collateral point, but he was not. The question then rests on the evidence introduced by the plaintiff. Any declarations of Brown, independent of that, are not evidence.

James Mallory testified that Jared Betts, one of the plaintiffs, informed him that the will could not be found, that James Brown had been up to Brunswick, and looked for the will in the desk where he supposed it was left, and it could not be found. This is certainly a very explicit admission by one of the plaintiffs. Harvey Betts and Thaddeus Dan stated to the surrogate that they presumed there had been a will, but it could not be found; and that search had been made. The plaintiff's counsel introduced the petition and affidavit of Brown, Betts and Dan, to obtain administration. These, however, are silent as to the question whether due search had been made. The defendants, who claim under the will, were called on to prove that they had made diligent search. Search by other persons, and not at their request, will not suffice. The admission by Jared Betts and Thaddeus Dan to the surrogate was, not that Brown or either of the defendants had made search, but generally that the will could not be found. In what manner and by whom search was made, they do not state. It was an admission that did not exonerate the defendants from giving affirmative proof of search made by them or some of them.

The only evidence remaining is the statement made by Jared Betts on another occasion. Although this admission might have been sufficient to conclude him, if he had been the only plaintiff, it ought not to affect the interest of the other plaintiffs who claim as tenants in common with him. If an ejectment is

brought by tenants in common, the plaintiff may give in evidence the separate titles of the several lessors to separate parts of the premises, and recover accordingly: 12 Johns. 185. But it would seem an unjust rule which would suffer one tenant in common to admit away the rights of others. As far as I have been able to discover, an admission by a party to the record is evidence against him who makes it; and where there are partners, against them also, but not against others who happen to be joined as parties to the suit. The cases which speak of the admission as proper evidence, will be found to have reference to a sole plaintiff or defendant. The confession, then, of Jared Betts that Brown had made search was no evidence to dispense with the production of the will, and furnished no ground to admit secondary evidence, so far as the other plaintiffs were concerned. On this point the verdict should be set aside, and a new trial granted.

New trial granted.

PROOF OF WILL.—The general doctrine of *Dan v. Brown*, that a will may be proved by one of the subscribing witnesses, if he can testify to all the facts required to make a valid execution, or even by circumstantial evidence where all the witnesses are dead, insane, or beyond the jurisdiction, or have forgotten the facts, is approved in *Jackson v. Vickory*, 1 Wend. 418; *Hall v. Luther*, 18 Id. 498; *Butler v. Benson*, 1 Barb. 588; *Lawrence v. Norton*, 45 Id. 451; *Rider v. Legg*, 51 Id. 263; *Weir v. Fitzgerald*, 3 Bradf. 74; *Harris v. Harris*, 26 N. Y. 487; *Cow v. Robertson*, 5 Id. 184. See, also, to the same effect: *Welch v. Welch*, ante, 127, and the note to that case, where this subject is discussed and other authorities are cited. The same doctrine was affirmed in a subsequent decision on Benajah Brown's will in *Jackson v. Betts*, 6 Cow. 877.

PROOF OF LOSS.—See *Jackson v. Betts*, 9 Cow. 208, where there was a decision on the same will, and where the rule here laid down on this point was reiterated. See, also, *Fetherly v. Waggoner*, 11 Wend. 602, approving the principal case, and holding that as the evidence in such cases is addressed to the court technical strictness of proof is not required.

REVOCATION WHEN PRESUMED.—In *Betts v. Jackson*, 6 Wend. 189, reversing 9 Cow. 208, it was held that as Brown's will was last seen in the testator's possession a considerable period before his death, the presumption was, in the absence of evidence to the contrary, that he revoked it. The same doctrine was applied in *Bulkley v. Redmond*, 2 Bradf. 284, citing the principal case. In *McPherson v. Clark*, 3 Bradf. 97, the rule here laid down by Woodworth, J., as to what is necessary to revoke a will, is approved. See, also, the note to *Gains v. Gains*, 12 Am. Dec. 877, where the subject of revocation of wills is discussed.

DECLARATIONS OF TESTATOR.—That declarations of a testator are not admissible either to prove the execution or existence of his will, or on a question of revocation, unless they accompany an act relied upon as a revocation: see *Grant v. Grant*, 1 Sandf. Ch. 287 and *Waterman v. Whitney*, 11 N. Y.

161, approving the rule here stated by Woodworth, J., on that subject. See the note to *Jackson v. Kniffen*, 3 Am. Dec. 395, as to the admissibility of testator's declarations generally.

ADMISSIONS OF CO-TENANT.—That admissions of one tenant in common, do not bind his co-tenants: see *Lane v. Doty*, 4 Barb. 536, and *Corning v. Troy Iron and Nail Factory*, 39 Id. 325, where the principal case is relied on as an authority on this point.

SPAWN v. VEEDER.

[4 COWEN, 503.]

AMENDMENT OF BILL OF PARTICULARS may be allowed after the cause has been tried, a new trial granted, and two notices of trial after this, on payment of costs of the motion, and all costs, if the defendant, on account of the amendment, changes his defense.

MOTION for leave to amend the plaintiff's bill of particulars. It appeared that the declaration, with the bill of particulars, was served August 1, 1822; that issue was joined August 20, 1822, and the cause tried in April, 1823, when the bill of particulars proved to be defective. After a verdict for the plaintiff, a new trial was granted in February, 1824, since which time the cause had been twice noticed for trial, and now stood noticed for trial. The defect in the bill of particulars arose from the fact that the plaintiff's attorney had not been fully instructed by his client, who lived at a distance of four hundred miles.

S. A. Foot, for the motion.

J. McKown, contra.

By COURT. These amendments are much a matter of discretion. The plaintiff's attorney has not been very diligent in procuring proper information from his client; but it will further the ends of justice to grant the amendment. We save the defendant from all costs resulting to him from the mistake. If he chooses to change his plea, so as to vary his defense, he may do so; and then the plaintiff must first pay him all the costs, from the plea down to this time, inclusive. If not, the amendment is granted, on the plaintiff's paying the costs of this motion.

Rule accordingly.

AMENDMENTS, ALLOWANCE OF.—See *Chichester v. Cande*, ante, 238, and note. The authority of the principal case on this point is recognized in *Barth v. Walther*, 4 Duer, 230; and *Chapman v. Webb*, 6 How. Pr. 394.

BURT v. STERNBURGH.

[4 COWEN, 559.]

JUDGMENT ESTOPPEL.—The judgment of a court of concurrent jurisdiction directly upon the point, is as a plea a bar, or as evidence conclusive between the same parties upon the same matter, directly in question in another action.

ESTOPPEL OF JUDGMENT results not from the recovery, but from the matter alleged by the party and upon which the recovery proceeded.

JUDGMENT IN TRESPASS QUARE CLAUSUM FREGIT in favor of plaintiff is, in a subsequent action against the same defendant for trespass on the same premises, conclusive evidence of the plaintiff's title, where such title was drawn in question and litigated in the former suit. The defendant is, however, entitled to show that he has acquired title since the former action, or that plaintiff's title has terminated.

TRESPASS quare clausum fregit. At the trial, the cutting of the timber, which was alleged as a trespass, was proved. The plaintiff claimed title to the *locus in quo*, as being a part of the Schoharie patent. But the defendant claimed on the other hand, that the *locus in quo* was in a patent granted to Weyfield and Clifford, and that he held the title thereto under one George W. Featherstonhaugh. The plaintiff thereupon offered in evidence an exemplification of the record of a judgment of the supreme court in his favor against the defendant, in a former action between them, for a trespass committed at a previous date upon the same land, together with parol evidence showing that the defendant then relied upon the same title which he now claims. The evidence was admitted against the defendant's objection, and was decided to be conclusive evidence of the plaintiff's title. An objection made by the defendant that the plaintiff had not proved possession of the premises at the time of the alleged trespass, was overruled. The defendant then offered to prove that the premises were embraced in the Weyfield and Clifford patent, and that he had title thereto at the time when the trespass was alleged to have been committed, but the evidence was objected to, and the judge refused to admit it. Verdict for the plaintiff, and a motion for a new trial.

D. Cady, for the defendant, contended that the former judgment was not conclusive evidence of the title, except for the period embraced in the declaration in that action, and cited *Outram v. Morewood*, 3 East, 357.

H. Hamilton and A. Spencer, for the plaintiff, cited *Duchess of*

Kingston's case, 11 St. Tr. 262, and *Gardner v. Buckbee*, 3 Cow. 120 [*ante*, 256], to show that the former recovery was conclusive.

By Court, SUTHERLAND, J. In *Gardner v. Buckbee*, 3 Cowen, 120 [*ante*, 256], we adopted the language of Chief Justice De Grey, in the case of the *Duchess of Kingston*, 11 State Trials, 261, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence conclusive between the same parties, upon the same matter, directly in question in another court. In that case the former judgment was not pleaded, but was given in evidence under the general issue; and the counsel for the defendant there contended that the later cases had overruled the opinions of Lord Mansfield in *Bird v. Randall*, 3 Burr. 1353, and of Chief Justice De Grey, in the case of the *Duchess of Kingston*, that a former judgment is as conclusive in its operation when given in evidence as though it were pleaded. The case of *Vooght v. Winch*, 2 B. & A. 662, was relied upon. But we considered those opinions too well supported, both by principle and authority, to admit of discussion.

It is well remarked by Lord Ellenborough in *Outram v. Morewood*, 3 East, 353, that the operation and effect of a former recovery, if it operate at all as a conclusive bar, must be by way of estoppel; that it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds which creates the estoppel. The recovery of itself, he continues, in an action of trespass, is only a bar to the future recovery of damages for the same injury. But the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having once been distinctly put in issue by them or by those to whom they are privy in estate or law, has been on such issue joined, solemnly found against them. In that case the question which the defendant wished to contest was, whether coal mines, in relation to which the action was brought, were at the time of making a certain conveyance by Sir John Zouch, part and parcel of the coal mines included in that conveyance. The plaintiff showed by his replication that the precise point had been raised between the same parties in a former action and decided in his favor, and the court held that the defendant was estopped from again raising that question; that the point was conclusively settled between the parties by the verdict.

In this case it was shown that the former trial was between the same parties, for a trespass committed by the defendant upon the same premises, for a trespass upon which this action

was brought; that the defendant then attempted to defend himself under a title from George W. Featherstonhaugh, and contended, and endeavored to prove, that the *locus in quo* was in a patent granted to Weyfield and Clifford, and not in the Schoharie patent, as was contended by the plaintiff; and it was admitted, on the former trial, that if the premises were in the Schoharie patent, the plaintiff was entitled to recover; if in the Weyfield and Clifford patent, that the defendant was entitled to a verdict. The former verdict must then have turned on that point, and it was in favor of the plaintiff. Yet that was the precise question which the defendant sought again to agitate in this case. He offered to prove that the *locus in quo* was in the Weyfield and Clifford patent, and that he had title to it when the trespass was alleged to have been committed. The decision of the judge, that the former recovery, and the evidence offered by the plaintiff, were conclusive evidence of the plaintiff's title, must be understood as having been made after the defendant had disclosed the defense and title on which he relied; and as determining nothing more than that, in relation to that title, founded on the allegation that the premises were in the Weyfield and Clifford patent, the recovery and evidence were conclusive. The offer on the part of the defendant was nothing more than to show that the premises were not in the Schoharie, but in the Weyfield and Clifford patent. If this is the fair construction of the case, of which I have no doubt, I think the decision of the judge was correct. The defendant was estopped from again opening that question.

But he certainly was not concluded by the former verdict from showing title in himself, acquired subsequently to that trial, or indeed any other title than the one depending on the point settled in the former cause. He might have shown that the plaintiff's title had been extinguished, either by alienation or a subsequent adverse possession. But, I repeat, I understand his offer was simply to show that the premises were not in the Schoharie patent, but in the patent of Weyfield and Clifford, and that, therefore, the plaintiff had no title. That was impugning the verity of the former verdict, which he had no right to do. This case cannot be distinguished in principle from *Gardner v. Buckbee and Outram v. Morewood*.

Motion for a new trial denied.

THE DOCTRINES HERE LAID DOWN, as to the effect of a prior judgment between the same parties, whether pleaded as an estoppel or offered as evidence, and as to the admissibility of parol evidence to supplement the record

in such cases are referred to with approval in many subsequent decisions in New York: *Coles v. Carter*, 6 Cow. 691; *Wood v. Jackson*, 8 Wend. 24, S. C., 18 Id. 123; *Young v. Rummel*, 2 Hill, 480; *Miller v. Manice*, 6 Id. 125, where it was said that such judgment must be pleaded as an estoppel if the party has an opportunity to plead it; *Wilbur v. Brown*, 3 Denio, 361; *Calkins v. Allerton*, 3 Barb. 173; *Baker v. Rand*, 13 Id. 161; *Harris v. Harris*, 36 Id. 94; *Royce v. Burt*, 42 Id. 663; *Birkhead v. Brown*, 5 Sandf. 142; *Treadwell v. Stebbins*, 6 Bosw. 547; *Boyer v. Schofield*, 2 Keyes, 631; *White v. Coatsworth*, 6 N. Y. 143, per Edmonds, J.; *Doty v. Brown*, 4 Id. 75; *Embury v. Brown*, 3 Id. 523; *Demarest v. Daig*, 11 Abb. Pr. 16; see, also, *Gardner v. Buckbee*, ante, 256, and cases cited in the note thereto.

JACKSON EX DEM. STEWART v. TOWN.

[4 COWEN, 699.]

PURCHASER AT EXECUTION SALE, WHAT HE MUST PROVE.—If real property is sold under execution, against a party not in possession, the purchaser can not recover in ejectment, against one found in possession, without showing that the defendant in execution had some interest in the premises or some right to the possession thereof. It is not sufficient to establish that he was in possession for a period less than twenty years, but abandoned it before judgment, though after so abandoning he conveyed to the defendant in ejectment.

JUDGMENT LIEN attaches only to a legal or equitable seisin, and if defendant has neither, an execution sale transfers nothing.

POSSESSION IS PRIMA FACIE evidence of legal title.

DEFENSE OF EXECUTION DEFENDANT.—If defendant in execution is in possession he can not defend ejectment brought by the purchaser, by showing title in another.

DEFENDANT'S EVIDENCE may entitle plaintiff to judgment when his own does not.

VOLUNTARY DEED founded on love and affection is good against creditors unless the grantor was, at the time, in doubtful or insolvent circumstances.

PURCHASERS AT EXECUTION SALES are within the protection of the registry acts.

EJECTMENT. The plaintiff's lessor claimed title under an execution sale upon a judgment against Eleanor Town. The defendant, who was in possession, claimed under a prior deed from said Eleanor, who was the defendant's mother. The deed was not recorded, and the plaintiff's lessor had no notice of it at the time of his purchase. The other facts are stated in the opinion.

A. Stewart, for the plaintiff.

I. Seelye, for the defendant.

By Court, WOODWORTH, J. Eleanor Town, the mother of the defendant, was in possession of the farm, claimed it as her own,

and exercised acts of ownership until November 1, 1820, when she removed from the premises. Who succeeded her does not appear. These facts constitute a good adverse possession during the time she occupied; but the moment she removed, the continuity of the adverse possession was broken, and, in judgment of law, the possession was in him who had title. There is no evidence of title in Eleanor Town, nor how long her adverse possession continued. To derive any benefit from the latter, it must appear to have been for at least twenty years. That not being pretended, the fact is not established that she ever had any right or title to the premises. In February term, 1823, Darley recovered against her a judgment for words spoken in May, 1822, the premises were sold on an execution issued on this judgment, and the lessor, who was attorney for Darley, became the purchaser. The certificate of sale is dated May 7, 1823. On the ninth of August, 1824, the land not being redeemed, the sheriff executed a deed, which was recorded the day after.

The first question arising in this case is, does the evidence introduced by the plaintiff entitle him to recover? In my opinion, it clearly does not. Whenever real estate is sold under an execution, against a party not in possession, and the purchaser brings an action of ejectment against the person found in possession, it can not be questioned that the plaintiff is bound to prove on the trial that the defendant in the execution had some right, title or interest in the premises sold. The first section of the act (1 R. L. 500) declares that lands, tenements and real estate may be sold, and the judgment shall be a lien on the same. The form of the execution would seem to imply a legal seisin, but can not control the declared intent of the legislature, which makes every species of real estate liable to sale. When a statute speaks of a seisin, an equitable may be as well intended as a legal one; the term is applicable to both: 1 Cai. Cas. 66. It is evident, then, that a seisin must be shown upon which the judgment attached, in order to recover the possession. Where the defendant in the execution is the possessor, it is of itself sufficient, for actual possession is *prima facie* evidence of a legal title: 2 Bl. Com. 196. He can not show title in another, for the plaintiff comes into exactly such estate as the debtor had, and if it was a tenancy, the plaintiff will be a tenant also, and estopped in a suit by the landlord from disputing his right, in the same manner as the original tenant. This was so held in *Jackson v. Graham*, 3 Cai. 188.

There is, then, a failure on the part of the plaintiff to make

out any right in Eleanor Town to the premises, and, consequently, from his own showing, nothing passed by the sale. If, however, the defendant has produced proof which sufficiently establishes the right of Eleanor Town, the plaintiff may avail himself of the evidence, for the judgment of the court must be founded on the whole case. The defendant gave in evidence a deed from Eleanor Town to Lydia Town, her daughter, the defendant, then nineteen years of age, executed on the thirtieth of March, 1821, for a money consideration, and proved that a part of the consideration had been paid. Does this additional fact remedy the defect in the plaintiff's proof? After an attentive consideration of its efficacy, I think it does not. Separating this act from everything relating to the former possession of Eleanor Town, with which it does not appear to have any connection, it does not furnish evidence of any right in her at the time the conveyance was made. The case is silent as to the fact in whom was the title vested; and as to possession, that had been abandoned several months previously. It does not appear that Eleanor Town had even a right of possession to transfer to the defendant. How, then, can it be said that she took anything under the deed? It purports to convey all the right, and as against the grantor, would estop her from asserting a right to dispossess the defendant, but nothing more. Here, then, as it seems to me, is an insuperable difficulty in the plaintiff's way. His deed is necessarily inoperative, unless the judgment was a lien, and that can not be, unless there is a legal or an equitable seisin. Eleanor Town not having either, nothing would pass by the sale to the plaintiff. It would be a perversion of the statute, authorizing the sale of lands, tenements or real estate, to adjudge that a case of this kind was within its provisions.

But there is another answer equally conclusive; if it be admitted that at the date of the deed Eleanor Town had seisin of the premises, then she parted with all her right and title, and the deed is valid, if not fraudulent and void against creditors and subsequent purchasers.* There are no circumstances disclosed to establish fraud. It does not appear that the grantor was indebted at the time, and the deed was executed more than a year before the speaking of the words for which the damages were given. The deed was given for a money consideration, a part of which was paid. We can not intend that the consideration was inadequate, or that the payment was not well secured. If it was intended to attack the transaction as fraudulent, on either of these grounds, proof of the facts ought, and probably would,

have been brought before the court. In the absence of proof it may be presumed the plaintiff rested on other grounds. We are to intend, on the facts before us, that the deed was *bona fide* and for valuable consideration, and consequently valid against the claims of creditors and subsequent purchasers. In this view of the case it becomes unnecessary to consider how far the law would protect the defendant, provided it had been a conceded point, that the mother made the deed to her daughter on the consideration of natural love and affection. In that case it would unquestionably have been good against creditors, according to the construction given to the 13 Eliz., because it is free from the imputation of fraud. This question was very ably examined by Spencer, C. J., in *Verplank v. Sterry*, 12 Johns. 536 [7 Am. Dec. 348]. It was there held that to impeach a voluntary settlement made on a meritorious consideration, it is necessary that the seller should not only be indebted, but should be insolvent, or in doubtful circumstances at the time; that if the grantor be not indebted to such a degree as that the settlement will deprive the creditors of an ample fund for the payment of their debts, the consideration of natural love and affection will support the deed, although a voluntary one, against his creditors. The statutes 13 and 27 Eliz. contain the general proviso annexed to our statute, excepting from their operation those deeds only which are *bona fide* and upon good consideration.

The same learned judge observed in the case referred to that the deed from Arden to Mrs. Sterry had these two circumstances: it was *bona fide*, and it had a good consideration, that of love and natural affection, and was saved by the express proviso of the statute. I entirely subscribe to the doctrine that neither a creditor under the 13 Eliz., nor a subsequent purchaser under the 27 Eliz., can impeach a conveyance *bona fide*, founded on natural love and affection, free from the imputation of fraud, and where the grantor had, independent of the property, granted an ample fund to satisfy his creditors; with this qualification, however, that if a fraudulent use is made of a settlement, it may be carried back to the time when the fraud commenced, as was held in *Doe v. Rutledge*, Cowp. 713. If the grantor continues in possession and receives the rents and profits, or if there are other circumstances subsequently, calculated to deceive the subsequent purchaser, without doubt they would contaminate the deed; but without them it would be valid. If this view be correct, it follows that had the deed in question been founded on love and affection merely, the plaintiff could not, on the

facts before us, as a creditor or subsequent purchaser, have defeated its operation. *A fortiori*, he cannot, when it is shown not to rest on a meritorious but valuable consideration and is not contaminated with fraud. If then the deed has not been successfully assailed on this ground, by its legal operation all the right and title of Mrs. Town was transferred to the defendant long before the judgment attached. After the thirtieth of March, 1821, there was no interest remaining in her that was the subject of sale. She had no lands, tenements or real estate within the meaning of the statute, and, consequently, there was nothing to give life or effect to a sheriff's deed, which solely derives its efficacy from the fact that the defendant in the execution had an interest liable to be sold.

But it is contended that a *bona fide* purchaser at a sheriff's sale, without notice of a prior deed not recorded, is protected by putting his deed on record. It is true that the deed to the defendant has not been recorded. I will briefly inquire whether that fact is material. It has been urged on the argument that the statute is confined in its application to a purchaser from the same grantor. The words used in the act are: "Any subsequent *bona fide* purchaser or mortgagee for valuable consideration:" 1 R. L. 370. The statute is remedial, and ought to be liberally construed. To say that the second deed must, in all cases, be given by the same grantor, is too limited a construction to remedy the evil the legislature had in view. The intent being to guard the fair subsequent purchaser against secret outstanding conveyances, why should not the statute apply, where the second deed was obtained mediately from the same grantor as well as to cases where it was immediately given by him? If a defendant confesses a judgment, he thereby indirectly authorizes a sale, and the execution of a deed. If judgment is obtained against him, without a plea of confession, although it cannot be said that the defendant assented to the judgment and sale, yet they are founded on his delinquency. The non-payment of the debt due from the debtor is the foundation of the judgment and sale. Whether willingly or unwillingly, the whole proceeds from the fault of the debtor who is to be considered as the source from whence the purchaser derives his claim. It would therefore seem not to be a forced construction of the statute to apply it to such cases. In either case, the reason for protecting the purchaser is the same. I therefore concur in the opinion expressed in *Jackson v. Dubois*, 4 Johns. 216; and *Jackson v. Terry*, 13 Id. 471.

In the first case, Mr. Justice Spencer observed that a mortgage not registered had a preference over a subsequent judgment docketed. But if the land should be sold by the sheriff under the judgment prior to the registry of the mortgage, a *bona fide* purchaser at the sheriff's sale would be protected against the mortgage. It was not necessary to the decision of that case to lay down this doctrine, nevertheless, I think it correct for the reasons already given. The case in 13 Johnson expressly decides that, if after land has been sold on execution, and a conveyance made by the sheriff, and before such conveyance is recorded, the former proprietor conveys it to a *bona fide* purchaser for a valuable consideration, who has his deed first recorded, such subsequent purchaser will gain a priority. The doctrine in this case supports the proposition laid down in 4 Johnson. It turned on priority of recording. Terry, the defendant, derived title under a judgment prior to the date of the deed from James Turner to the lessor of the plaintiff, and yet failed, because his deed had not been first recorded. If a sheriff's deed is within the recording act, it seems to me clear that the principle of this case which entitled Merrit to recover on a junior title first recorded would entitle a purchaser at sheriff's sale, whose deed was recorded, to a preference over a prior unregistered mortgage. I consider the law correctly laid down in both cases; but they do not decide the present question. In each of those cases the defendant in the execution had an interest liable to be sold. In the first, Sammons was mortgagor, and had an interest upon which the judgment was a lien; in the second, the deed from Archibald Turner to James Turner was fraudulent and void as against creditors; consequently the judgment against Archibald became a lien, having been entered before James Turner made a *bona fide* sale to Merrit. These facts were essential, in order to maintain the proposition that a sheriff's deed is within the recording act. In the present case, Eleanor Town had no title, and the judgment was no lien. I can not perceive that the plaintiff acquired anything more than if the sheriff had sold and conveyed the same premises on an execution against John Doe or Richard Roe, who were utter strangers. A subsequent *bona fide* purchaser, within the meaning of the act, must be one to whom the grantor in the first deed actually conveyed, or who did or suffered some act which, by the operation of law, authorized a sale and conveyance; and if the deed was in consequence of a sale under a judgment, then that the property sold was a legitimate subject of such sale.

These principles decide the plaintiff's claim. Eleanor Town has not conveyed to the plaintiff nor done any act authorizing a valid conveyance. There was no lien on the premises; and no authority was given by law to sell and convey. How liberal and extensive soever may be the construction of the statute, and giving full effect to the cases referred to, I think it demonstrable that the present case is not within the spirit or letter of the fourth section of the act concerning deeds, and, consequently, that the defendant is entitled to judgment.

Judgment for the defendant.

THE NEW YORK COURTS HAVE RECOGNIZED THE AUTHORITY of *Jackson v. Town*, on the following points: As to the distinction between existing and subsequent creditors in cases of conveyances to defraud creditors, *per Stebbins*, senator, in *Seward v. Jackson*, 8 Cow. 436; as holding a different doctrine from *Reade v. Livingston*, 8 Am. Dec. 520, on the subject of voluntary conveyances: *Babcock v. Eckler*, 24 N. Y. 633; that if the defendant in execution was in possession at the time of the sheriff's sale, that fact is sufficient evidence of title against those claiming under him: *Jackson v. Parker*, 9 Cow. 84; *Jackson v. Jones*, Id. 192; that a naked claim to property by one out of possession can not be sold on execution, but that in such a case the purchaser must show title in the defendant: *Hagaman v. Jackson*, 1 Wend. 505; *Tuttle v. Jackson*, 6 Id. 225; that, generally, to support a sheriff's deed, judgment, execution, and title in the defendant must be shown: *Jackson v. Roberts*, 11 Wend. 433; that the ground of the decision here was Eleanor Town's want of title, and that the case is, therefore, not authority on the effect of the failure to record the defendant's deed: *Jackson v. Chamberlain*, 8 Wend. 626; that the registry acts are remedial in character and should, therefore, be liberally construed, and that substantial compliance with them is sufficient: *Peck v. Mallams*, 10 N. Y. 542; as to the sale of an equity of redemption on execution in *Hall v. Sayson*, 19 How. Pr. 483.

CASES
IN THE
COURT OF ERRORS
OF
NEW YORK.

FELLOWS v. FELLOWS.

[4 COWEN, 682.]

JOINDER OF CAUSES AND PARTIES.—A bill filed against several persons, concerning distinct things or acts, is demurrable. Unconnected parties may unite in a suit, if there is one connected interest among them all, centering in the point in issue in the case.

JOINDER OF DEFENDANTS IN BILL TO VACATE FRAUDULENT TRANSFERS.—If property be fraudulently conveyed and parceled out by its owner to several persons, they may be joined in one bill to vacate the transfers.

PURCHASES BY ADMINISTRATORS in the proceedings prosecuted by them in their official capacity are held by them as trustees; the *cestuis que trust*, are entitled, if they so elect, to the benefit of the purchases.

CREDITOR'S BILLS to reach and discover the property of the debtor, placed in the hands of others, may be maintained.

PREVENTING MULTIPLICITY OF SUITS is a favorite object of courts of equity; and in furtherance of this object, they settle and adjust, in a single suit, rights and interests, which, in courts of law, result in various issues incapable of trial in one action.

A BILL AGAINST SEVERAL PERSONS must relate to matters of the same nature, and having a connection with one another; and all of the defendants must be more or less concerned, though their rights in respect to the general subject of the cause may be distinct.

APPEAL from the court of chancery. The respondents, who were the administrators of Ezra Fellows, deceased, filed their bill in the court below against William Fellows, the appellant, John Fellows, Thomas Fellows, and Roswell Day, to obtain satisfaction of a certain decree recovered by the respondents, as administrators, against John Fellows, father of the intestate, out of property alleged to have been fraudulently conveyed by the said John Fellows, to the said William and Thomas, his

sons, and Roswell Day, his son-in-law. The bill charged in substance, that the said Ezra and John Fellows had made an agreement for the sale of a certain farm of which the said John had the legal title, but in which Ezra had an interest, with the understanding that one thousand five hundred dollars of the consideration-money was to be paid to the said Ezra, but that the said John, with intent to defraud the said Ezra out of said sum, took the bond and mortgage in his own name, and afterwards released the same and took notes payable to himself from the sons of the purchaser in lieu thereof; that the said Ezra subsequently filed a bill against his father to obtain payment of the sum due him, and procured an injunction against the transfer of said notes; that the said Ezra having died pending the suit, the same was revived in favor of his administrators, the respondents, who subsequently obtained a decree against the said John Fellows for the payment of the said sum of one thousand five hundred dollars, and interest; that while said suit was pending, and after the injunction was served, the said William Fellows, Thomas Fellows, and Roswell Day, having full knowledge of all the facts, fraudulently combined and confederated with the said John Fellows, and with each other to assist the said John Fellows so to manage and conceal his property as to delay and defraud the respondents out of the sum due the said intestate; that, in pursuance of said fraudulent combination, some of the notes aforesaid were transferred by the said John Fellows fraudulently, voluntarily, and without consideration to the said William, others to the said Thomas, and others to the said Roswell Day, and that the said John Fellows, also fraudulently, voluntarily, and without consideration, conveyed to the said Day a farm in Malta, Saratoga county, and another farm to the said Thomas; that afterwards the respondents took out a writ of *fi. fa.* on their decree against the said John Fellows, upon which twenty dollars was levied out of the said John's personal property; that the said execution was then levied on the land conveyed to the said Day and the said Thomas; that the respondents purchased the former tract for three hundred dollars, and the latter for fifty dollars, which sum was afterwards paid by the said Thomas to redeem the land, and that the writ was returned *nulla bona* as to the residue.

The bill prayed that the conveyances to the said Thomas Fellows and Roswell Day should be delivered up and canceled; that an account should be taken of moneys paid on the notes, and that the balance due on the respondent's decree should be

paid, etc. The defendants demurred severally, and the appellant, William Fellows, assigned for cause of demurrer that the bill was exhibited against the other defendants for several distinct matters, in many of which the appellant was not interested, as appeared from the bill, and that by uniting these matters the pleadings would be made unnecessarily long and intricate, and the appellant subjected to great expense. The appellant also filed an answer, denying in substance that he had fraudulently combined with the other defendants to delay or defraud the respondents as charged in the bill, etc. The demurrers were overruled, and the chancellor decreed that the defendants should put in good and sufficient answers within six weeks; from which decree William Fellows appealed. The reasons assigned by the learned chancellor for his decree are omitted, as the same arguments are used in the opinions of the judges in the court of errors, hereinafter reported.

S. G. Huntington and S. A. Foot, for the appellant, contended:

1. That the bill presented several distinct matters with which the appellant had no concern, and that this was a proper ground of demurrer, citing 2 Madd. Ch. 234 (1 ed.); 1 Harr. Pr. 392 (8 ed.); Mitf. Pl. 147 (3 ed.); Eq. Drafts, 422, 423; Coop. Eq. Pl. 182, 183; *Whaley v. Dawson*, 2 Sch. & Lef. 367, 370; *Dilly v. Doig*, 2 Ves. jun. 486; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, 149; 2. That matters claimed in the right of the intestate were united with matters claimed by the respondents in their own right, it not appearing that they had purchased the land at the execution sale in their representative character, and that the purchase could not be thrown upon the intestate's heirs and distributees without their knowledge or consent: Sugd. Law of Vend. 35 (Am. ed. 1820); *Beardsley v. Root*, 11 Johns. 464 [6 Am. Dec. 386]; 1 Madd. Ch. 269 (1 ed.); 2 Id. 384; *Ex parte Bennell*, 10 Ves. 381, 400; *Earl of Winchelsea v. Norcliffe*, 1 Vern. 435, 437; *Nelthorpe v. Penniman*, 14 Ves. 517; *Prowse v. Abingdon*, 1 Atk. 484; Toller's Law of Ex. 182; Bac. Ab., Guardian (G); 3. That the respondents had shown no ground for discovery or relief, and that the court should look into the whole case and decide it on the merits: *Le Guen v. Gouverneur*, 1 Johns. Cas. 436 [1 Am. Dec. 121]; *Bush v. Livingston*, 2 Cai. Cas. 66 [2 Am. Dec. 316]; *Beebe v. Bank of New York*, 1 Johns. 529 [3 Am. Dec. 353]; *Beckman v. Frost*, 18 Id. 544 [9 Am. Dec. 246].

J. L. Velie and A. Van Vechten, for the respondents, con-

tended: 1. That the rule as to joinder is that a bill may be filed against several persons relative to matters of the same nature forming a connected series of acts intended to defraud the plaintiffs, in which all the defendants are concerned, though not joining in each act: *Whaley v. Dawson*, 2 Sch. & Lef. 367; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; 2. That it sufficiently appeared that the respondents purchased under the execution as administrators: 1 Madd. Ch. 91 (1 ed.); *Campbell v. Walker* and *Whelpdale v. Cookson*, 5 Ves. 682; *Lister v. Lister*, 6 Id. 631; *Ex parte Bennett*, 10 Id. 381, 392; *Sanderson v. Walker*, 13 Id. 601; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; *Hart v. Ten Eyck*, Id. 104; *Davoue v. Fanning*, Id. 252; *Hendricks v. Robinson*, Id. 311; *Howell v. Howell*, 4 Id. 118; *Van Horne v. Fonda*, 5 Id. 388.

WOODWORTH, J. It is material to ascertain what facts in the bill are admitted by the demurrer. Whatever is not covered by the answer is necessarily admitted. The denial is, that the appellant did not combine with the other defendants to defraud or delay the respondents. Excluding this charge as not admitted the following facts alleged in the bill are conceded: that all the defendants in the court below were acquainted with, and had full knowledge of the agreement made for the sale of the farm between Ezra Fellows and John Fellows, and the proportion of the purchase-money that Ezra Fellows was to receive; that they had knowledge of the filing of the bill against John Fellows, and the service of the injunction restraining him from selling or disposing of the notes in question. The bill also charges that John Fellows, under the apprehension that a recovery would be had against him, came to a fraudulent determination, and entered into a fraudulent and secret combination with the defendants so to manage and conceal the property as to delay and defraud the respondents; and that in fulfillment of this fraudulent design, without any valuable consideration, he transferred two of the notes to his son William, and two others to his son Thomas; and also conveyed forty acres of land in Malta to his son-in-law, Roswell Day, and four acres to his son Thomas.

Now, on looking at the answer, it will be seen that the denial extends to this merely, that the appellant did not combine with the other defendants below to defraud; that is, according to the legal and grammatical meaning of the term, they did not join together or agree to act in concert, for the purpose of consummating this fraud. Admitting that there was no formal agree-

ment that they should all unite in the act, yet it stands confessed that all had intimate knowledge of the whole transaction. They knew the justice of the respondents' claim against John Fellows, and knowing this, William Fellows, Thomas Fellows, and Roswell Day consented to become actors, and severally took transfers of separate parcels of John Fellows's property, which transfers are admitted to have been made fraudulently, and without consideration. Granting that there was no express agreement between the parties to defraud, the demerit, in a moral point of view, was not the less that they acted individually, and not in concert. Whether, in a legal point of view, the objection that several distinct matters are alleged, in which the appellant is not interested, can prevail, I will briefly examine.

The general rule will not be questioned, but where a bill is filed concerning things of distinct natures, against several persons, it is demurrable; but unconnected parties may join in a suit, when there is one connected interest among them all, centering in the point in issue in the cause: 2 Madd. 234; 2 Anst. 469, 477. In the present case, the object is to reach the property of John Fellows in the hands of the appellant, and the other defendants. The property was fraudulently parceled out, and conveyed to three individuals. But for the fraudulent acts of the appellant and the other defendants, the respondents might have obtained the fruits of their decree against John Fellows. The claim against all is of the same nature. The fraud alleged against each one of the defendants is the same. The question to be decided is in every respect the same. The transfer being fraudulent, the property was not changed by being put into the hands of the defendants. The respondents seek the property of John Fellows, which the defendants hold without title. They are, therefore, all necessarily concerned in the thing to be recovered, although they set up distinct interests to separate parcels. I am clearly of opinion that this is not a case within the rule relied on by the appellant; but must be considered as falling within that class of cases, where there is a common interest among all, centering in the point in issue in the cause. Lord Redesdale, in *Whaley v. Dawson*, 2 Sch. & Lef. 370, observes that in the English cases, where demurrers, because the plaintiff demanded in his bill matters of distinct natures against several defendants not connected in interest, have been overruled, there has been a general right in the plaintiff covering the whole case, although the rights of the defendants may have

been distinct. In such cases, the court proceeds on the ground of preventing multiplicity of suits, where one general right is claimed by the plaintiff against all the defendants. A demurrer lies where the subjects of the suit are, in themselves, distinct. Here the subject is the property of John Fellows in the hands of the defendants. The case does not afford ground for a demurrer within the authorities cited.

It is also objected that the respondents have connected, in the bill, claims in their own right and in their right as administrators. I do not so understand the bill. The whole of the proceedings were in their right as administrators. The purchase by the respondents at the sheriff's sale, was in the character of administrators. They were agents and trustees, and could not divest themselves of the trust. The *cestuis que trust* were entitled to take the land at their election; and the respondents, having purchased in this manner, may, in their representative capacity, call in the aid of the court to perfect their title: 5 Johns. Ch. 388; 1 Madd. Ch. 91; 5 Ves. 682. The power of the court of chancery to assist a judgment and execution-creditor to discover and reach the property of his debtor in whosoever hands it has been placed, I have considered as well settled, since the case of *Hadden v. Spader et al.*, 20 Johns. 554. There can be no well-founded objection on this ground. I consider this case much stronger; for here the appellant does not stand as a mere bailee, but as having no colorable ground of claim to the notes or the avails of them. On every ground upon which this cause can be viewed, I am of opinion that the decree of his honor the chancellor be affirmed.

SUTHERLAND, J. The object of the bill is to enable the respondents to reach the property of John Fellows, against whom they have a decree, fraudulently transferred by him to the other defendants, and thus put beyond the reach of the execution of the respondents. The object is a legitimate one; and to the accomplishment of which a court of equity will readily lend its aid. The power and authority of the court of chancery to grant the aid and relief asked for, is fully established in the case of *Hadden v. Spader*, 20 Johns. 554, decided by this court. If the allegations of the bill be true, here is a most iniquitous attempt on the part of a debtor to put his creditor at defiance, and defraud him of his just debt by a voluntary and fraudulent distribution of his property among his children. That the respondents are entitled to relief, is clear; and the only question is, whether they must seek it by separate suits against each

of the individuals implicated in the transaction, or whether they are at liberty to bring them all into court in one suit.

It is a favorite object with a court of equity to prevent multiplicity of suits. For this purpose, it is a general rule in chancery, that all persons materially interested must be made parties. Creditors are permitted to unite in calling on the representatives of a deceased debtor, for an account of the assets of the estate; or one or more of them may prosecute the suit in behalf and for the benefit of the whole. The forms of proceeding in chancery, and the power of the court to mould its decrees so as to suit the various equities of the case, as established by the proof, enable it advantageously to settle and adjust, in a single suit, rights and interests which, according to the rules of pleading in the courts of common law, would necessarily result in various issues, incapable of being tried in a single cause, and disposed of by a single judgment.

But notwithstanding this disposition of a court of equity to prevent the multiplication of suits, it will not permit several plaintiffs to demand by one bill several matters perfectly distinct and unconnected against one defendant; nor one plaintiff to demand several matters of different natures against several defendants. And the reason of this rule is said to be that such a proceeding would tend to load each defendant with an unnecessary burden of cost, by swelling the pleadings with the statement of the several claims against the other defendants with which he has no connection: Coop. Eq. Pl. 182; Mitf. 146; 2 Madd. Ch. 294; 2 Harr. Ch. Pr. 289; 1 East, 227. And also to prevent confusion, and to preserve some analogy to the comparative simplicity of declaration at common law. But where several persons, although unconnected with each other, are made defendants, a demurrer will not lie, if they have a common interest centering in the point in issue in the cause: 2 Anst. 477; 2 Madd. Ch. 294. Nor will it lie where one general right is claimed by the bill, though the defendants have separate and distinct rights. Thus, in the *Mayor of York v. Pilkington*, 1 Atk. 282, it was held that a bill to quiet the plaintiff in a right of fishery might be brought against several defendants, although there was no privity between them and the plaintiff, and they claimed distinct rights. The plaintiff claimed a general right to the fishery extending to all the defendants; and it was held that they might avail themselves of their several exemptions and distinct rights, upon an issue to try the general right. The bill was sustained for the sake of peace,

and to prevent a multiplicity of suits. A bill against several unconnected defendants to establish the custom of a mill, and a right to tithes, has been sustained upon the same general principle; and that it was for the establishment of a right liable to invasion by all the world: *Whaley v. Dawson*, 2 Sch. & Lef. 370. But the proprietor of a copyright can not proceed in one bill against several booksellers, between whom there is no privity or connection, for a violation of his right.

This was so held in *Dilly v. Doig*, 2 Ves. jun. 486, and the lord chancellor remarks that he does not remember any case, upon patent rights, where a number of persons, acting all separately, upon distinct grounds, have been permitted to be brought before the court in one bill; and he takes the distinction between a bill to establish a right of fishery, or the custom of a mill, and the case then before him. So, also, if an estate is sold in parcels to different purchasers, the vendor can not unite them all in one bill for a specific performance, nor can they unite in one suit against the vendor for the same purpose; for each contract is separate and independent, and each case must depend on its own peculiar circumstances: *Raynor v. Julian*, 2 Dick. 677; Coop. Eq. Pl. 182. In the case of *Ward v. The Duke of Northumberland and the Earl of Beverly*, 2 Anst. 469, the bill was held bad, not only because a considerable part of it related merely to the private concerns of the duke, with which Lord Beverly had no concern, but it was bad as against the duke alone, because, although he was interested in every part of it, it was in different characters; individually and solely as to some, and in the character of executor, and jointly with Lord Beverly as to others. But Chief Baron McDonald there recognizes the principle "that unconnected parties may be joined in a suit where there is one common interest among them all centering in the point in issue in the cause."

It is not sufficient, as was held in *Saxton v. Davis*, 18 Ves. 71, that the parties have a common interest in some one or more items in an account charged. The contrary position was taken in that case by the counsel for the complainants; but it was conclusively answered by Sir Samuel Romilly, that if that were sufficient, the objection to a bill, as multifarious, could never be sustained. They must have a common interest, not in a particular item, or insulated charge in the bill, but in the point in issue in the cause. And this seems to be the general test laid down in all the elementary writers and acknowledged by all the cases in England. The only difficulty is in its application.

This question was fully considered and discussed by the late chancellor in *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, which was a case very analogous, in many respects, to the one now before the court. The complainants in that case were several distinct and unconnected judgment-creditors of the Genesee manufacturing company; and the object of their bill was to obtain satisfaction of their debt out of the property of the company, which they alleged had been withdrawn from the reach of their executions by the fraudulent acts of the defendants, some of whom were the trustees of the company; and one object of the bill was to charge the trustees individually for neglect of duty and fraud. With that charge, it was said, the defendants, who were not trustees, had no concern. Another object was to charge others of the defendants as stockholders; and another, to redeem certain personal property purchased by two of the defendants, with which the other defendants were not shown to have any concern. The bill charged that five of the defendants fraudulently confessed a certain judgment, in which the other two were not alleged to have had any interest; and the bill was demurred to as multifarious, on these among other grounds. The chancellor, after stating the facts in the case, remarks: "It thus appears from the bill that all the defendants were not jointly concerned in every injurious act charged. There was a series of acts on the part of the persons concerned in this company, all produced by the same fraudulent intent and terminating in the deception and injury of the plaintiff. The defendants performed different parts in the same drama, but it was still one piece, one entire performance, marked by different scenes; and the question now occurs whether the several matters charged are so distinct and unconnected as to render the joining of them in one bill a ground of demurrer."

After considering all the English cases he observes that "the principle to be deduced from them is that a bill against several persons must relate to matters of the same nature and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct." And in relation to that particular case he goes on to remark that, "when we consider that the plaintiffs are judgment-creditors, having claims against the Genesee company, perfectly established, and not the subject of litigation in this suit, and that the general right claimed by the bill is a due application of the capital of that company to the payment of their judgments; that the subject of

the bill and of the relief and the only matter in litigation is the fraud charged in the creation, management and disposition of that capital, in which charge all the defendants are implicated, though in different degrees and proportions, I think we may safely conclude that this case falls within the reach of that principle, and that the demurrer cannot be sustained." He accordingly overruled it. These observations are as just and pertinent in their application to this case, as to that in which they were used. Here the respondents are judgment-creditors of John Fellows, having their claims perfectly established by a decree in chancery, and not the subject of litigation in this suit. Here, also, the general right claimed by the bill is a due application of the property of John Fellows to the payment of their judgment. Here, also, the subject of the bill and of the relief and the only matter in litigation is the fraud charged in the management and disposition of that property; and in which charge all the defendants are implicated, though in different degrees and proportions. Here the defendants, therefore, have one common interest among them all, centering in the point in issue in the cause; and distinct matters of different natures are not demanded by the bill. It is one matter, the property of John Fellows; and the point in issue, upon which the rights of all the parties must depend, is, whether the transfer of that property to his sons and son-in-law, who are his co-defendants, was fraudulent or not.

Why may not that question be tried as well in one as in three suits? The transfer to each is alleged to have been made with the same fraudulent intent, at the same time; to have been received by each without consideration, with a full knowledge of the fraudulent motive with which it was made, and an entire acquiescence and participation in it. It was, in truth, but one transaction in which the defendants all participated. The evidence in relation to each must be substantially the same. Neither the pleadings nor the proofs are essentially varied or enlarged from what they would necessarily have been had the bill been filed against one of the defendants only. If all the parties to a fraudulent transaction like this can not be called to an account in one suit, it is in the power of dishonest debtors, by a distribution of their property in minute portions, among their relations and friends, to defraud their creditors and set them at defiance with impunity. The expense and delay of separate suits would render their prosecution worse than useless for all purposes of indemnity or relief. The establishment

of such a doctrine would be most mischievous; and I am persuaded that it has as little foundation in authority as it certainly has in the large and comprehensive principles of substantial justice and equity.

The other point made on the part of the appellant, that the respondents have joined and connected claims in their own right, and claims in their right as the representatives of Ezra Fellows, is unfounded in fact. It grows out of that part of the bill in which the respondents state the proceeding upon the execution and the sale of the real and personal estate, and that they became the purchasers at such sale of the lot which had been conveyed to Roswell Day and Thomas Fellows. The first objection is that they do not state in the bill that they purchased as administrators. That allegation is in the same form with every charge in the bill. It commences by stating the respondents to be the representatives of Ezra Fellows, and in all the subsequent parts they designate themselves simply as your oratrix and orator, without adding their description of administrators; but that is to be understood throughout, and was unnecessary to be stated. If, then, they purchased as administrators, it is not for the defendants to question their authority. It is to be presumed in this stage of the cause, that they purchased at the request and for the benefit of the heirs, and a court of equity would compel them to account to the estate.

I am, therefore, of opinion that the decree of his honor, the chancellor, should be affirmed.

SAVAGE, C. J. In *Brinkerhoff v. Brown*, 6 Johns. Ch. 157, the late chancellor, after a full examination of the cases cited on the argument of this cause, deduces from them this principle: "That a bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct." The cases cited, in my judgment, warrant this rule. In *Dilly v. Doig*, 2 Ves. jun. 486, it was held that two booksellers, who had been guilty of an invasion of the plaintiff's copyright, could not be joined as defendants in the same bill, on the ground that there was no privity. The lord chancellor says, however: "If the defendant against whom you had got the injunction, had transferred his books to another, I would have followed it." Now, it is fair to infer that if the bookseller enjoined had sold his books to several persons who were privy to the injunction, and all of whom took the books with the

express purpose of defrauding the plaintiff, though each might have no interest in the books sold to the other, yet, they would have been so far connected as to be properly joined in one suit.

In the case put by Lord Kenyon of an estate sold in parcels to several individuals, who could not be permitted to unite in a bill for a specific performance, there is a distinct contract with each individual which may admit of very different considerations. Not so in the case now before the court. There was in the hands of John Fellows certain property in the custody of the law, sequestered, if I may use the expression, and set apart to answer the demand of Ezra Fellows. This fact was perfectly known to all the defendants, and each of them, separately, as we are to intend (for they have denied the combination and confederacy), conspired with John Fellows to defraud the respondents, by collusively taking separate parts of the property and holding it for the benefit of John Fellows. There was no privity between William Fellows, Thomas Fellows, and Roswell Day, but there was privity between each of them and John Fellows. If then, we take the rule as laid down by the counsel for the appellant, "that there must be a common point of litigation, the decision of which affects the whole, and will settle the rights of all," still this case comes within it. The common point of litigation is the fraudulent transfer of the property of John Fellows to the other defendants. If the source of their title be corrupt, the property is taken with the taint of corruption, and though the person receiving it may have been innocent of all fraud, yet he must suffer a loss in consequence of the impure channel through which it came. This point was so decided at the last term of this court in *Whelan v. Whelan*, 3 Cowen, 537. And if so with respect to an innocent person, *a fortiori*, a partaker in the corruption shall not retain what he has thus received. In my opinion, therefore, the appellant here comes within the rule relied on by the respondents. The matters are not distinct. They are component parts of one corrupted body. On this point (and this I consider the only point in the case) I am of opinion that the decree of his honor the chancellor be affirmed.

There is no ground for the allegation that the respondents come in two capacities. They acted throughout as the representatives of Ezra Fellows; as trustees for those interested in the estate, and to whom they are accountable for the land purchased with the estate in the respondents' hands.

COLDEN, Senator. It is not denied that, under the case made by the bill, the respondents may be entitled to relief; but it is contended that the court of chancery could make no decree in their favor in this case, because the appellant was impleaded in the court below with other defendants. It is admitted to be a rule of equity pleading, that matters which are distinct and of different natures, can not be joined in the same bill. It often happens that it is not easy to ascertain whether the matters which are the subject of a suit are or are not distinct and of different natures, and therefore it is frequently difficult to determine when the rule I have mentioned is to be applied. It is this difficulty which has given rise to the numerous cases that have been cited in the argument. I shall not attempt to reconcile these authorities, or to do more than to ascertain whether the general rule be applicable to the case now under consideration, so as to preclude the respondents from maintaining their suit. The counsel for the appellant could not avoid admitting that if there were a joint liability on the part of the defendants below, the demurrer could not be sustained. And they also, very properly as it appears to me, admitted that if the defendants below were parties to the fraud, which is the gravamen of the bill, and acted in concert to accomplish it, there was such a connection between them as would render them jointly responsible. Then the question which we are to decide is, in my opinion, reduced to this: whether the facts stated in the bill warranted the chancellor in concluding that all the defendants below were parties and confederates in the fraud, which it is alleged was practiced by the father in transferring his real and personal property to his son-in-law and to the brothers of Ezra.

It is expressly stated in the bill that each of the defendants below was acquainted with all the transactions of the father, in relation to the property in question, from the time of the sale to Adsit till it came into their hands. They had full knowledge of the proceedings in the revived suit against the father, and of the injunction which was granted in that suit. They advised and aided the father in the management and defense of that suit. They took from the father, without giving him any consideration, a voluntary conveyance in different parts, of all his property, each of them knowing that such transfer was made with a view to defraud, and that it would defraud Ezra. To William, the appellant, the father transferred two of the Adsit notes; to Thomas two other of the same notes, which notes, or their proceeds, it is averred, these sons

fraudulently retain. To the son-in-law, the father conveyed a farm in Malta, as the bill charges, fraudulently, voluntarily, and without consideration, and with a view to avoid the effects of a decree against him in the pending suit, and in the same way, and with the same views, he conveyed another piece of land in Malta to his son Thomas. It is expressly charged in the bill, not only that this property was transferred to, but that it is held by the grantees with a view to, defeat the claim of their brother Ezra. Now, if we take the allegations of the bill to be true, it seems to me, we can not hesitate to say that the defendants below were jointly concerned in practicing the fraud, which was intended to defeat, and which hitherto has defeated the just claim of the respondents. I say the just claim, because, although we have heard from the counsel that the farm at Stillwater originally belonged to the father, and that his object was to make a distribution of it among his children, yet no such facts appear on the record. We know of no owner of the farm prior to Ezra.

We may apply to this case, in my opinion, with great propriety, the words of the chancellor in *Brinkerhoff v. Brown*, 6 Johns. Ch. 139: "There was a series of acts on the part of the persons concerned, all produced by the same fraudulent intent, and terminating in the deception and injury of the respondents. The appellants played different parts in the same drama, but it was still one piece, one entire performance, marked by different scenes." Other expressions of the chancellor, in the same case, are not less adapted to the present occasion. "The subject of the bill," he says, "is the fraud charged, in which charge all the defendants are implicated, though in different degrees and proportions." The connection between the defendants in that case and their co-operation in the transactions, which were the foundation of the suit, were certainly less obvious than is the participation of the defendants below in the acts against which relief is sought in the present instance. It is hardly necessary to stop to point out the great difference between the case presented by the bill and the cases cited by the counsel for the appellant, in which it is decided that independent, unconnected holders of different parts of property which a complainant may claim, either on the ground of its having been fraudulently transferred to them, or on any other ground, can not be made the subject of a single suit.

But it is said that though the demurrer would, if it stood alone, admit the allegations of the bill, and would, therefore,

acknowledge the fraud, and the co-operation of the defendants below in its perpetration; yet, that there is in this case an answer, and that the answer denies the fraud, and the charges in the bill from which it is deduced. If this were so, I think there would be no hesitation in deciding that the suit against the defendants jointly could not be maintained. But so far from this being the case, the answer does no more than deny the general and formal charge of combination. It appears to be drawn with great care not to deny any one of the facts which are stated in the bill as evidence of the fraud, and from which the conclusion, that the appellant, William, acted in concert with his father and brother-in-law, with a design to defraud Ezra, results. Had the appellant said in his answer that he knew nothing of the agreement between Ezra and his father; that he was not privy to the relinquishment of the bond and mortgage to Adsit, and the substitution of the Adsit notes, and the new mortgage; that he was ignorant of the proceedings in the original, and in the revived suit; that he and the defendants below were not their father's agents or advisers in the management of that suit; that the transfer of the notes and the conveyances of the lands were made for a good or valuable consideration, and without any design to defeat the claim of the respondents, then the interest of the defendants would have been distinct and separate; there would have been no joint liability; and though a demurrer might not have been proper, if the answer had met these charges, as it would then have covered the whole bill, yet such an answer, if it would not have defeated the claim of the respondents, would, at least, have been fatal to this joint suit.

But the answer we have now before us is, as I have said, no more than a denial of the combination; and, indeed, amounts only to the general denial of fraud and confederacy, which is the conclusion of all answers, and which is always insufficient where, as in this case, fraudulent acts are particularly charged. There is another ground on which, in my opinion, this demurrer must fail. It is charged in the bill that the notes were transferred, and the conveyances made to secure them as the effects of John Fellows, and with respect to the lands, it is averred that they are held for his use and benefit. These charges are not denied by the answer, and are, therefore, admitted by the demurrer. The defendants below, then took and yet hold the property or the proceeds as trustees for the grantor. I apprehend a court of equity would never allow trustees under these circumstances to set up their title or trust against the claim of a

creditor of the *cestui que trust*. Again, if the property be the property of John Fellows, in the hands of the defendants below as his trustees, though they hold different parcels of it, the suit is not for separate and distinct matters any more than it would be if it were against John Fellows himself, solely, and claimed from him money, notes, and lands. It has been objected that the defendants below are not proper parties, inasmuch as they claim in their representative characters, and the transactions show that if they have any title it is in their own right. But it appears to me that the complainants had no connection with these affairs but as administrators. This and another point made here, viz: that the notes were *res judicata*, do not appear, from the chancellor's opinion, to have been raised when the cause was before him. They do not seem now to have been much relied upon by the counsel for the appellant, and I am not prepared to say that the demurrer can be sustained on either of these grounds.

The rule that multifarious matters shall not be joined in the same suit, seems to me to be all that requires consideration for the decision of this case. This is a rule of convenience, and, however necessary its general observance may be, yet, though in this case it were to be admitted that the matters are distinct and of different natures (which, in my opinion, they are not) still it is obvious that justice may be administered between the parties in this suit, without subjecting the appellant or his co-defendants to any of the embarrassments, the fear of which is the foundation of the rule. Nevertheless, if it appeared clearly to be applicable to the case, we could not refuse the appellant the advantage of it; but when it is so apparent that justice may be done, although there should be error in not allowing the demurrer, there is less reluctance in deciding that it must be overruled.

My opinion is, that the decree of his honor, the chancellor, should be affirmed.

This being the unanimous opinion of the court, it was thereupon ordered, adjudged, and decreed that the decree of his honor, the chancellor, in this cause, be affirmed with costs to the respondents, to be taxed upon the appeal to this court, and that the record and proceedings, etc., be remitted, etc.

JOINDER OF DEFENDANTS IN EQUITY.—The cases furnish no definite rule by which to determine with precision in every instance, when defendants who claim under distinct and unconnected titles may be sued jointly in equity, without making the bill obnoxious to the charge of multifariousness. As Lord Cottenham says, in *Campbell v. Mackay*, 7 Simon, 564, S. C.: 1 Mylne

& C. 603: "To lay down any rule applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible." McLean, J., in delivering the opinion of the court, in *Gaines v. Chew*, 2 How. U. S. 619, refers with approbation to this remark, and says: "Every case must be governed by its own circumstances, and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject." To the same effect, see *Edwards v. Sartor*, 1 S. C. 266; *Warren v. Warren*, 56 Me. 360; *Butler v. Spann*, 27 Miss. 234; Story Eq. Pl., sec. 530. Indeed, the application of the rule against multifariousness must necessarily rest largely in the discretion of the court in each particular case, for, as is said in *Bowers v. Keesecher*, 9 Iowa, 422, the rule itself is to a considerable extent one of convenience. The court will, in each instance, choose that course which seems most likely to enable it to do complete equity in the particular case, with the least expense, delay and trouble, striving on the one hand to obviate the necessity of a multiplicity of suits, and on the other to avoid vexing individual defendants, with the litigation of questions with which they have no concern.

PERHAPS THE BEST GENERAL RULE that can be laid down is that stated by Wilde, J., in *Dimmock v. Bizby*, 20 Pick. 377, that the objection of multifariousness does not hold "where one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights." The rule is similarly stated in *Vann v. Hargett*, 2 Dev. & B. Eq. 31; *Butler v. Spann*, 27 Miss. 234; *Forniquet v. Forstall*, 34 Id. 87; *Bowers v. Keesecher*, 9 Iowa, 422; *Bugbee v. Sargent*, 23 Me. 269, and *Lewis v. St. Albans Iron and Steel Works*, 50 Vt. 477, and is in accord with the doctrine of the principal case.

JOINDER OF DIFFERENT ASSIGNEES OF FRAUDULENT DEBTOR.—The application of the rule in the principal case seems not to have met the approval of Mr. Justice Story. In the note to section 286, Story's Eq. Pl., after stating the result of *Fellows v. Fellows*, and *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, the learned editor says: "Without meaning to question the doctrine above referred to, it may well be doubted, whether there are any English authorities which fully bear out the propositions in the cases in 6 Johns. Ch. 139, and 4 Cow. 682, or are easily reconcilable with them."

Notwithstanding this seeming doubt, the conclusion arrived at in the principal case, that, where a judgment-debtor fraudulently transfers his property in distinct parcels, and by separate conveyances at different times to different persons, who have no communication with each other, the judgment-creditor seeking to set aside such transfers may join the debtor and his several assignees in one bill, is well settled in New York, and in other states: *Hammond v. Hudson River etc. Co*, 20 Barb. 378; *Boyd v. Hoyt*, 5 Paige, 65; *Reed v. Stryker*, 12 Abb. Pr. 47; *Morton v. Weil*, 11 Id. 421; *Lawrence v. Bank of Republic*, 35 N. Y. 320; S. C., 31 How. Pr. 502; *Williams v. Neel*, 10 Rich. Eq. 338; *Planters etc. Bank v. Walker*, 7 Ala. 926; *Chase v. Searles*, 45 N. H. 511; *Bartee v. Tompkins*, 4 Sneed, 623; *Randolph v. Daly*, 16 N. J. Eq. 313. In most of these decisions the principal case is referred to and commented upon as a leading authority on this point. Thus, Chancellor Walworth says, in *Boyd v. Hoyt*, 5 Paige, 65:

"The decision of the court for the correction of errors in the case of *Fellows v. Fellows* 4 Cow. 682, settles the principle, that where a debtor conveys different portions of his property to several persons in fraud of the rights of his creditors, a creditor who has obtained a judgment, and placed himself in a situation to enforce his right against the debtor, and his fraudulent grantees may file a bill against the grantor and all the grantees jointly; to reach the

property conveyed to each, and have the same applied in satisfaction of his judgment. Whatever doubts, therefore, may have existed on the subject previous to this decision of the court of *dernier resort*, this must now be considered as the settled law of this court. The same principle is applicable to the case of a complainant, who proceeds as a judgment-creditor after the return of an execution unsatisfied, under the thirty-eighth section of the title of the revised statutes relative to the court of chancery: 2 R. S. 173. * * * I have no doubt, therefore, that two or more persons holding the property of the judgment-debtor under different conveyances, or becoming indebted to him at different times, or for distinct sums, may be joined with him as defendants in a creditor's bill, under this provision of the revised statutes. And if, for any cause, it becomes impossible to make the debtor himself a party to a bill to obtain satisfaction of the judgment out of his estate in the hands of third persons, and the creditor has a right to institute a suit in chancery for that purpose, I can see no good reasons for permitting him to join several persons in the same suit, in the former case which are not equally applicable in the latter. Where the object of a suit is single, but different persons have, or claim, separate interests in distinct or independent questions, all connected with and arising out of the single object of the suit, the complainant may bring such different persons before the court as defendants; so that the whole object of the bill may be obtained in one suit, and to prevent further unnecessary and useless litigation." So in *Reed v. Stryker*, 12 Abb. Pr. 47, Harris, J., delivering the opinion of the court of appeals, not only comments with approval upon the principal case, but supports its doctrine by a very cogent argument.

OTHER APPLICATIONS OF RULE.—In analogy to the doctrine of the principal case, it was held in *Wade v. Rusher*, 4 Bosw. 537, that a partner who claimed that there was a balance due him from his copartner, and that the latter had fraudulently procured from him a release of liability, could join as co-defendants with the said partner, in a suit for an accounting and payment, and to set aside the release, etc., third persons to whom the copartner had at different times fraudulently transferred portions of the partnership assets. So in *New York etc. R. R. Co. v. Schuyler*, 17 N. Y. 592; S. C., 7 Abb. Pr. 41, it was decided that holders of spurious stock certificates in a railroad corporation, fraudulently issued by one of its officers, could be joined in a suit by the corporation, in the interest of the genuine stockholders, to cancel said certificates. See, also, a similar decision in *Bank of America v. Pollock*, 4 Edw. Ch. 215. So in *Boyden v. Lancaster*, 2 Patt. & H. 198, a bill by a widow joining certain persons to whom her husband had, at different times, conveyed land, in which she had not released her dower, and claiming dower in the several parcels, was held not to be multifarious. So, a bill by an heir against her ancestor's executors and different persons to whom they had conveyed portions of the estate: *Gaines v. Chew*, 2 How. U. S. 619. So, where a bill was filed by heirs against the administrator of the intestate's estate, joining therein persons to whom he had separately sold and conveyed portions of the estate, the object being to set aside the transfers, because the administrator had sold without lawful authority, a question in which it was held all the defendants had a common interest, though claiming under distinct conveyances: *Bowers v. Keesecher*, 9 Iowa, 422. So, where a legacy had been made payable by two devisees of the testator, one being liable for one third and the other for two thirds, and distinct tracts had been devised to each, the legatee was permitted to join them as defendants in a bill to compel payment of the legacy, or to make it a charge on the land, or

for other appropriate relief: *Bugbee v. Sargent*, 23 Me. 269. For further illustrations of the doctrine, see *Carroll v. Roosevelt*, 4 Edw. Ch. 211; *Butler v. Spann*, 27 Miss. 234; *Forniquet v. Forstall*, 34 Id. 87; *Stone v. Knickerbocker Life Ins. Co.*, 52 Ala. 589; *Ross v. Swann*, 56 Ill. 37; *Lewis v. S. Albans Iron and Steel Works*, 50 Vt. 477; *Arnold v. Arnold*, 11 W. Va. 449; *Smith v. McLain*, Id. 654. And see *Whitten v. Whitten*, 36 N. H. 326, where it was held that a bill for partition against several, and to set aside a deed made by one of them, was not within the rule and was multifarious. See, also, *Hardin v. Swoope*, 47 Ala. 273, where a decision, apparently somewhat at variance with the doctrine of the principal case, was made.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

DEPAU *v.* OCEAN INSURANCE CO.

[5 COWEN, 63.]

AN INSURER OF A VESSEL is not at liberty to show that she had received part of the injury before the voyage, unless she was in fact unseaworthy.

ABANDONMENT BY ASSURED.—The assured can not abandon after the vessel has been repaired and is successfully pursuing her voyage.

LIEN FOR EXPENSES.—No lien upon a ship is created by the sale of part of its cargo, at a port of necessity, to pay for repairs.

A GENERAL AVERAGE FAIRLY SETTLED, in a foreign port of destination, though not a port of necessity, is conclusive between the assured and the underwriters.

ASSUMPSIT on a policy of insurance on one half the ship *Manchester Packet*, for two thousand dollars, on a voyage from Havana to Rotterdam. While on the voyage, the ship experienced very severe weather, a number of the crew died, and having sprung aleak, she put into Halifax. She arrived there September 6, 1820, was repaired at a cost of more than half her value, and then proceeded on her voyage, arriving in Rotterdam in the latter part of February following. The plaintiff abandoned for a total loss in December, 1820. It appeared that at Halifax, some sugar, a portion of the cargo, was sold to defray expenses, and the averages stated. A bottomry bond was also executed at this place to secure the balance of the expenses, and upon this bond the vessel was libeled and sold on her return to New York, not realizing enough by one hundred dollars to discharge the bond. Plaintiff's witnesses testified that the vessel was seaworthy at the inception of the voyage.

The defendants offered to prove that the larger part of the

expense at Halifax was incurred in repairing injuries received prior to the sailing of the vessel from Havana, and before the policy was executed. This evidence was overruled, but testimony admitted to prove, what, if any, repairs undergone at Halifax were unnecessary to render the vessel seaworthy. Defendants excepted, and objected that certain cables purchased were not needful repairs; that the abandonment came too late after the renewal of the voyage, and could not be affected by events subsequent.

Verdict for the plaintiff for three thousand dollars by consent.

T. A. Emmet and W. Slosson, for the plaintiff.

G. Griffin and J. O. Hoffman, contra.

By Court, SAVAGE, C. J. There can be no controversy as to the fact that the expense of the repairs exceeded one half the value of the vessel; and the cables must be considered and paid for as a part of her repairs. That the insurer is not at liberty to show that the vessel had received part of the injury anterior to the voyage, has not been disputed since the decision of *Depeyster v. The Columbian Insurance Company*, 2 Cai. 85, unless she was in fact unseaworthy. Assuming these points in favor of the plaintiff, had he, under the circumstances of the case, a right to abandon for a technical total loss?

In *Dickey v. The New York Insurance Company*, 4 Cowen, 244, it was decided that the assured could not abandon after the vessel was repaired and successfully pursuing her voyage. In that case, however, the vessel was considered as restored, the respondentia being no lien on the ship. In this case, the bottomry was executed at Rotterdam after the voyage had terminated on account of the sugar sold at Halifax, and port charges at Rotterdam. In the case cited, the master sold part of the cargo at the Isle of France, and was obliged to borrow money upon respondentia on the cargo; and the court say: "The vessel was not pledged for the payment; she must, therefore, be considered as beneficially restored; no impediment was placed in the way of prosecuting the voyage to a successful termination. The plaintiff, then, is entitled to recover for a partial loss only." This case is not to be distinguished in principle. Here, the master paid for the repairs at Halifax. To enable him to do this, he sold part of the cargo. No bottomry or respondentia was executed; no money was borrowed; and according to the case cited, there was no lien on the ship. She was then bene-

ficially restored. She did, in fact, prosecute her voyage, and was in the prosecution of her voyage on the eighth of December, 1820, when the offer to abandon was made. In *Da Costa v. Newnham*, 2 T. R. 407, the vessel was never beneficially restored. A bottomry bond was executed to raise money with which to make the repairs; under process upon which she was subsequently sold. In that particular, the case differs from the principal one.

According to the principles settled by this court, the plaintiff can recover for a partial loss only. He is entitled to the amount expended for repairs, deducting one third new for old; and also the difference between the price for which the sugar sold at Halifax and what they would have sold for at Rotterdam; the residue of the expenses at Halifax to be borne upon the principles of general average, the defendants to pay the ship's proportion of that average.

Strong v. The Fireman Insurance Company, 11 Johns. 323, decides that when a general average is fairly settled in a foreign port, and the insured is obliged to pay his proportion of it, he may recover the amount from the insurer, though the average may have been settled differently abroad from what it would have been at the home port. The averages settled at Rotterdam, upon which money was paid, or the bottomry bond given, must accordingly govern.

Rule accordingly.

REFERENCE IS MADE to this decision to support the respective positions taken in the following cases: A sale of a portion of the cargo of a vessel at a port of necessity, in order to make repairs, does not create a lien on the ship: *Buchanan v. Ocean Ins. Co.*, 6 Cow. 330; *American Ins. Co. v. Chester*, 3 Pai. 332. A general average fairly settled in a foreign port is conclusive between the underwriters and the assured: *Lewis v. Williams*, 1 Hall, 448; *Peters v. Warren Ins. Co.*, 3 Sumn. 393; S. C., 1 Story, 471. The validity of an abandonment depends on the state of facts actually existing at the time of the abandonment, without regard to the information received by the insured: *Pezant v. National Ins. Co.*, 15 Wend. 461; *Child v. Sun Mutual Ins. Co.*, 2 Sandf. 80. Insurers are not answerable for a loss attributable to the negligence of the owner: *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 368.

JACKSON EX DEM. SWARTWOUT V. JOHNSON.

[5 COWEN, 74.]

MAINTENANCE.—A deed is not void for maintenance or champerty if the lands are not at the date of its execution held adversely to the grantor.

POSSESSION UNDER A BOND FOR A DEED, or a contract of purchase, is not adverse to the vendor.

POSSESSION IS NOT ADVERSE unless accompanied by a claim to the entire title. The possessor must not recognize a higher title as vested in another person.

CUMULATIVE DISABILITIES are not allowed by the statute of limitations; but a party is entitled to all the disabilities existing when his cause of action accrues, and the statute does not commence to run against him until all have terminated.

A PERSON UNDER DISABILITY has ten years after the removal thereof in which to sue, although the twenty years in which other persons could sue have elapsed; if the disability be removed within the twenty years, then he must sue within ten years after such removal, provided that, in no case, can he be deprived of the full twenty years after the cause of action first accrued.

TENANT BY CURTESY.—The birth of a child at any time during coverture, constitutes the second husband tenant by curtesy initiate of all the lands of which the wife was, during coverture, so seised as to support such an estate. That the lands are held adversely when the child is born does not defeat the husband's right.

TENANCY BY CURTESY.—During the existence of this estate the lands do not descend to the heirs so as to give them a right of entry.

LIMITATION.—A right of entry in favor of a person must exist before the statute of limitations can run against him.

REVERSIONERS AND REMAINDER-MEN are not, during the existence of the particular estate, affected by the statute of limitations, because they have no right of entry.

SEISIN IN FACT on the part of the wife is not essential to constitute the husband tenant by curtesy; seisin in law is sufficient. When the title of the person claiming is complete without any entry, no actual seisin can be required to constitute her husband tenant by the curtesy.

POSSESSION TAKEN UNDER THE TRUE TITLE may become adverse to it.

TENANCY BY THE CURTESY DOES NOT EXIST unless there has been: 1. Marriage; 2. Seisin; 3. Issue born alive; and, 4. Death of the wife.

EJECTMENT for an undivided fourth part of lots 5 and 10 in Colden's tract. Two actions were tried at the same time, one Brainard being the tenant in the second proceeding. A clear paper title was proved in the lessors of the plaintiff, who claimed as children of one David Colden, whose name was in the attainder act, and whose lands were vested in Cadwallader Colden, in trust for the children of David. In November, 1792, Cadwallader executed to Catharine, a daughter of David, and at that time married to one Thomas Cooper, a deed for her undivided fourth part. This deed was lost, but what purported to be a copy was produced. Lease, entry and ouster were confessed. The lessors were the daughter of Catharine and Thomas Cooper, and her husband, Swartwout. Catharine died intestate in 1797.

The defendants claimed as follows: Cadwallader Colden, in

1790, gave a power of attorney to William Cooper, authorizing him to sell any of the lands he, Cadwallader, was intrusted with. The defendant in the first action gave in evidence articles of agreement between William Cooper and one Rogers, for the sale of lot 10, on payment of a certain sum by the year 1800; and proved that this contract was assigned by Rogers to defendant, who, in 1790, entered upon the lot, built a log-house, and held possession ever since, claiming it as his own; and that, in 1793, William Cooper, as such attorney, executed to defendant a deed for the premises, in pursuance of the articles of agreement. The defendant in the second action claimed as assignee under similar articles with one Morse, and under a deed from William Cooper, dated in 1795. This defendant had been in possession since 1790, having made a clearing and built a hut, and claimed the land as his own. Verdicts for the plaintiff for a fourth of the premises in question, subject to the opinion of the court.

J. O. Morse and D. Cady, for the plaintiff.

I. Seelye and R. Campbell, contra. The deed to Mrs. Cooper, in 1792, was void for champerty, as defendants had been three years in possession when it was executed. The deed is void, as she would have been compelled to bring an action to get possession: 1 Rev. Laws, 172; 3 Johns. Cas. 101; 2 Id. 41, 58; 5 Johns. 489; 11 Id. 91; 9 Id. 55; Co. Lit. 214. Thomas Cooper was not tenant by the courtesy: 1 Inst. 29, a.; 1 Cruise, 107, s. 10; Perkins, 464, 470. Under articles for the purchase of lands, a trust results to the purchaser: 3 Johns. Ch. 316; 1 Madd. Ch. 389, 390, 391.

SUTHERLAND, J. The lessors of the plaintiff made out a clear paper title to the premises in question, and are entitled to recover, unless the deed from Cadwallader Colden to Mrs. Cooper, of the fifth of November, 1792, was void under the statute of champerty and maintenance, or their rights barred by adverse possession.

The questions which arose in the suit of the same lessors against Cole, 4 Cowen, 587, whether the trust in favor of the heirs of David Colden, created by the act of 1787, was executed by the statute of uses, or if not, whether a conveyance from the trustee to the *cestuis que trust* was to be presumed, are excluded from this case, because an actual conveyance from their trustee is proved; and the first question which arises is whether that conveyance was valid. It bears date on the fifth

of November, 1792; and it is contended by the defendant that it was void, because at the time of its execution, the premises in question, which among others it purported to convey, were in the actual possession of the defendant, under a contract of sale made between Cadwallader Colden, by his attorney, William Cooper, and one Matthew Rogers, on the twelfth day of May, 1790. It appears that the defendant, as the assignee of that contract, entered upon a part of the premises which it contains, in the summer of 1790, made a small clearing, and erected a log-house; that on the thirteenth day of December, 1793, he took a deed from William Cooper, as the attorney of Colden, and has remained in the possession down to the time of the trial. This, it is said, was an adverse possession from the time of the defendant's entry in 1790; but if not so, then that it became adverse upon the receiving of his deed in 1793.

So far as the question of maintenance is concerned, it is not material whether the defendant's possession became adverse or not, upon receiving his deed in 1793. If the lands conveyed to Mrs. Cooper by the deed of November 5, 1792, were not then held adversely to the grantor, the deed was not void on the ground of champerty and maintenance, the adverse possession must exist at the time of the conveyance, in order to avoid it. If the defendant's possession was not then adverse to Cadwallader Colden, under whom he entered, it was in judgment of law the possession of Colden, and his conveyance would not be affected, either by the terms or the principles of the act against champerty and maintenance. In the view of that act, it would be valid, whatever might be its legal effect and operation.

Was the defendant, then, on the fifth of November, 1792, in possession of the premises in question, holding them adversely to Cadwallader Colden? By the contract with Rogers, he was to have a deed for his land from Colden, upon his paying him two hundred and sixty-two pounds and ten shillings, with interest, annually on or before the twelfth day of May, 1800. The contract does not, in terms, authorize Rogers to enter upon the land. It contains no words of present demise. It recites that Rogers, by his obligation, bearing even date with the agreement, was indebted to Colden in the sum of two hundred and sixty-two pounds and ten shillings, and covenants that in consideration thereof, the said Colden will convey to the said Rogers, the premises mentioned therein, if the said Rogers shall pay the said sum of two hundred and sixty-two pounds and ten shillings, with interest annually, on or before the twelfth day of May,

1800. Rogers, therefore, or his assignee was not entitled to a deed until the land was paid for. He did not enter claiming the whole title. The contract itself admits the title to reside in Colden, and that it was to remain in him until Roger's part of the agreement was performed. Now, admitting the deed to the defendant given in 1793, to be evidence of performance on his part, it is evidence of performance only at the time it was given, and not at any antecedent period. In 1792, therefore, when the deed to Mrs. Cooper was given, the defendant had not performed, and was not entitled to a conveyance. Such a possession has never been considered adverse. In *Jackson v. Bard*, 4 Johns. 230 [4 Am. Dec. 267], one Barton, in May, 1798, entered into articles of agreement with Dickenson and Harris, for the sale of certain premises. Soon after, one Smith purchased a portion of the premises from Dickenson by contract, and paid him twenty-five dollars, and entered into possession. On the eighth of March, 1799, Barton gave a deed to Dickenson, and took back a mortgage. Barton foreclosed the mortgage, and the lessor of the plaintiff became the purchaser, and took a deed from Barton on the mortgage sale. The tenant in possession under Smith forbid the sale, and it was contended that the possession of Smith was adverse at the time of the giving of the mortgage, so as to render it void, and prevent its operation; but this court held it not to be adverse to Barton's title. They say Dickenson could not have set up against Barton an adverse holding, and Smith, who claimed under him, must be considered as standing in the same situation.

In *Jackson v. Camp*, 1 Cowen, 605, the same principle is distinctly recognized. One Dyer made a contract for land with the agent of the proprietors in 1792, and entered under it. In 1794, he received his deed. In 1796, he sold a part of it to the defendant. It appeared that he took possession under his contract of land which the deed did not cover, and the defendant sought to retain it, on the ground of adverse possession. The possession taken under Dyer's contract was held not to be adverse on several grounds; but, among others, the court say, the agreement (made by Dyer with the agent) "did not put him in a situation to commence holding adversely until he performed the condition. The land still belonged to the proprietor of the township. Whether he ever would perform was contingent. He entered on the lot, it is true, but it was necessarily subject to the right of turning him off, if he neglected to make full payment. The possession, therefore, when taken, had not the char-

acteristics to constitute it adverse. It was not hostile in its inception. On the non-performance, Dyer would become liable to be turned out as a trespasser, and responsible in that character for the mesne profits." These observations are entirely applicable to this case, and are decisive of the question of adverse possession, at the time of the giving of the deed from Cadwallader Colden to Mrs. Cooper, in 1792. That deed, therefore, was not void, on the ground of champerty or maintenance.

A possession, in order to be adverse, must be accompanied with a claim of the entire title. If it appear that the title claimed is subservient to, and admits the existence of, a higher title, the possession is not adverse to that title: *Smith v. Burtis*, 9 Johns. 180. Now, in this case, the agreement between Colden and Rogers is an admission on the part of Rogers that the legal title remained in Colden; for it provided for the conveyance of that title to Rogers at a future period upon certain contingencies. If Rogers had not performed the agreement, it would have afforded all the evidence of title which would have been necessary to enable Colden to recover the possession from him in an action of ejectment. Colden might, perhaps, be considered as the trustee of Rogers, holding the legal estate in trust for him, upon performance on his part; and if Colden's estate in the land had been absolute and in his own right, and not in trust for the heirs of David Colden, his grantee would probably have taken it subject to the trust for Rogers, and might, perhaps, have been compelled in equity to convey. It may well be doubted whether, in a case like this, where the legal estate has been united to the older equitable interest, chancery would interfere in favor of a younger equity. But that inquiry is irrelevant here; for in this action the legal title must prevail.

But if the defendant had not such an adverse possession on the first of November, 1792, as to render the conveyance to Mrs. Cooper of that date void, it is contended that his possession, at all events, became adverse to the lessors of the plaintiff on the thirteenth of December, 1793, when he received his deed from Cadwallader Colden; and that the claim of the lessors of the plaintiff is barred by the statute of limitations. It is answered that Mrs. Cooper was, at that time, both an infant and *feme-covert*; that her coverture continued until her death in 1797; that the descent to her children was suspended during the life of Thomas Cooper, her husband, who was tenant by the courtesy, and who survived until 1817. In reply, it is denied that Mrs. Cooper ever was so seised as to constitute her hus-

band tenant by the courtesy. In order to create such a tenancy, it is said that there must be a seisin in fact, either in the wife or the husband in her right. But admitting there was a sufficient seisin, then it is contended that in December, 1793, when the defendant's adverse possession commenced, Cooper was not tenant by the courtesy, as it is not shown that Colden Cooper, his son, was then born; that his life-estate did not commence until the death of his wife, in 1797; and that the statute having commenced running in 1793, could not be impeded by any subsequent disability.

It is well settled that cumulative disabilities are not allowed or protected by the statute; that a party can only avail himself of the disabilities existing when the right of action first accrued: *Demarest v. Wynkoop*, 3 Johns. Ch. 138 [8 Am. Dec. 467]; and the cases there cited and examined by Chancellor Kent, and *Jackson v. Wheat*, 18 Johns. 45, where the doctrine is fully recognized.

It is also clear, both from the words and policy of the statute and the repeated expositions which have been given to it, that if twenty years have elapsed since the right of action accrued, and ten of those years have been free from disability, the right of entry is barred; that is, the party is not entitled to twenty years after the disability ceases, to bring his action, but to ten years only, provided, at the expiration of those ten years, twenty years have elapsed since the right of entry or action accrued.

Thus, in this case, Mrs. Cooper, in 1793, when the defendant's adverse possession commenced, was an infant and *feme-covert*. She was, at all events, entitled to twenty years to bring her action; and if her coverture continued also for twenty years, she was entitled to ten years after it ceased. The statute would have protected her for thirty years. But if her infancy and coverture had ceased at any time within ten years after the defendant's entry, then she was barred at the expiration of twenty years; because she had more than ten years free from disability. Her infancy, in fact, terminated in 1796, and her coverture in 1797, when she died. If her husband had not a life-estate as tenant by the curtesy, so that her lands then descended to her heirs, their right of entry terminated in 1813, being twenty years from the commencement of the defendant's adverse possession, and more than ten years after the termination of the disabilities and death of their ancestor: Kent, C. J., in *Smith v. Burtis*, 9 Johns. 181, considers this the true exposition of the statute; and although he says that the question did not neces-

sarily arise in that case, and, therefore, he did not wish the opinion on that point, then expressed by him, to be considered definitive, subsequent reflection and examination confirmed him in that opinion; for he reiterates it in the case of *Demarest v. Wynkoop*, already referred to: *Vid.*, also, 4 Taun. 826; 6 East, 50; 4 Day, 298; 2 Conn. 27; 4 Mass. 182; 4 T. R. 300; Plowd. 353.

Unless, therefore, Thomas Cooper was tenant by the courtesy of his wife's lands, so as to suspend their descent to her heirs, the claim of the lessors of the plaintiff is barred by the statute of limitations. It seems to be supposed by the counsel for the defendant, that, unless the life-estate of Cooper had vested, by the birth of a child, previous to the commencement of the adverse possession in 1793, although he might subsequently have become tenant by the curtesy, the heirs of Mrs. Cooper could not avail themselves of this new disability to avoid the bar of the statute of limitations; that it would fall within the principle of cumulative or successive disabilities, which are not allowed by the policy of the act.

It is clear that the birth of a child at any time during coverture, whether before or after the commencement of the defendant's possession, would constitute Cooper tenant by the courtesy of all the lands of his wife, of which during coverture she was so seised as to support such an estate. Lord Coke, 1 Inst. 30a, says: "Four things belong to an estate of tenancy by the courtesy, viz.: marriage, seisin of the wife, issue, and death of the wife. But it is not necessary that these should concur together all at one time; and, therefore, if a man taketh a woman, seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesy. So if he have issue which dieth before the descent:" *Vid.*, also, *Paine's case*, 8 Rep. 36; [cited sometimes 8 Rep. 35 b, and, of some editions, p. 67]; *Menville's case*, 13 Id. 23; 1 Cruise's Dig., tit. 5, Curtesy, ch. 1, s. 11, 25, pp. 107, 112, 113.

Cooper, then, had a life-estate in the premises in question, which was initiate, as it is expressed (Co. Lit. 30a), upon the birth of a child in 1793, and became consummate upon the death of his wife in 1797, and continued until his death in 1817.

During the existence of this particular estate, the lands of Mrs. Cooper did not descend to her heirs, so as to give them a right of entry. The question then recurs, whether this particular estate which arose, or was created subsequent to the commencement of the adverse possession in 1793, was a cumu-

lative disability, of which the lessors of the plaintiff cannot avail themselves under the statute, by way of excuse for not having brought their action within thirteen years after the death of their ancestor; the period within which they must have brought it, if this estate by the curtesy had not existed.

The statute declares that no person shall make any entry into lands, but within twenty years next after his right or title descended or accrued; provided, that if any person, entitled to make such entry, be, at the time such right or title first descended or accrued, within the age of twenty-one years, *feme-covert*, etc., such person and his heirs shall or may after the said twenty years be expired, make such entry as he or they might have done before the expiration of the said twenty years, so as such person, within ten years after such disability removed, or the heir or heirs of such person, within ten years after his death, make such entry. Now it is most obvious, that the heirs here contemplated are such heirs as have a right of entry. The object of the statute was to furnish parties guilty of laches in the assertion of their rights, by a forfeiture of them. The proviso was intended to save those, who, in judgment of law, had a reasonable excuse for their delay; and give to them and their heirs ten years after the disability should be removed, to bring such action, or make such entry as they might have brought or made within the twenty years. But the parties in reversion in this case could not have made entry, or brought any action to recover the possession during the twenty years. The statute would work great injustice, if it were held to affect the rights of reversioners or remainder-men, during the continuation of the particular estate. Such was the view of the statute taken by this court in *Jackson v. Schoonmaker*, 4 Johns. 390, and *Jackson v. Sellick*, 8 Id. 262. In the first case, it is said, that neither a descent cast, nor a statute of limitations, will affect a right if a particular estate existed at the time of the disseisin, or when the adverse possession began; because a right of entry in the remainder-man cannot exist during the existence of a particular estate. And the laches of a tenant for life will not affect the party entitled. The reason given shows that the circumstance, that the particular estate existed at the time of the disseisin, or when the adverse possession began, can vary the case. It applies with equal force to a case where it accrued subsequently.

In *Jackson v. Sellick*, the adverse possession commenced in 1772, when Vincent Matthews was tenant by the curtesy; the estate in reversion being in his daughter, then an infant. She

married Beekman in 1783; and Matthews, the tenant by the courtesy, died in 1784. Beekman, the husband, died in 1807, and his widow, the daughter of Matthews, was the lessor of the plaintiff. When the adverse possession commenced the only disability that existed, independent of the estate by the curtesy, was the infancy of the lessor. Her coverture did not commence until 1783; the particular estate having terminated in 1784. It was contended that the lessor being then of full age, and having a right of entry, was bound to exert it; and that she could not avail herself of her coverture; and it was urged that her coverture was a second or cumulative disability, which was never allowed. But the court held that during the particular estate, no right of entry had descended to the lessor; that the statute, therefore, did not begin to run until the death of the tenant by the curtesy; that coverture was the first disability; and they reiterate the language used by them in *Jackson v. Schoonmaker*, that the statute of limitation does not affect the right of a remainder-man during the continuance of the particular estate. If the rights of remainder-men or reversioners are not affected by the statute, then, during the life of the tenant by curtesy, it could not have run against the lessors; for they had no right of entry until his death. If Mrs. Cooper, then, was so seised as to constitute her husband tenant by the curtesy, the rights of the lessors are not barred by the statute of limitations, and they are entitled to recover.

It is said to be indispensable that there should be an actual seisin of the land either by the wife, or by the husband in her right, in order to constitute him a tenant by the curtesy; that a seisin in law is not sufficient to support such an estate; it must be in fact and in deed. This is undoubtedly the general language of the English authorities: Co. Lit. 39 a; Cruise Dig. 108, tit. 5, ch. 1, s. 10. But this rule, in its literal strictness, has not been adhered to, either in England or in this country.

In *De Grey v. Richardson*, 3 Atk. 469, Lord Hardwicke ruled that the husband was entitled to hold as tenant by the curtesy, an estate-tail descended to his wife from her brother, which was leased for years; and on which leases there were large arrearages, but no rent paid during the life of the wife. So that the possession of a lessee for years is so far the possession of the person entitled to the inheritance, even before the receipt of rent, as to entitle the husband to curtesy. And several other cases, in which the relaxation of the rule is exemplified, are collected in 1 Cruise Dig. 110, 111, 112.

In this court, *Jackson v. Sellick*, 8 Johns. 270, it was held not to apply to wild and uncultivated lands; that in relation to them actual occupation was not necessary to sustain an estate by the curtesy; that the possession follows the title, so as to enable the owner to maintain trespass, and, with equal reason, to sustain an estate by the curtesy.

But it is suggested by the counsel for the plaintiff, and I think with great force, that the rule requiring an actual seisin applies only to cases in which the title of the person claiming is not complete till entry. Thus a person claiming by descent or devise has only a seisin in law before entry; and if he die before entry, the inheritance will go not to his heir, but the heir of the person last actually seised. Upon such a seisin of the wife, there could be no estate by the curtesy. Her issue would not be capable of inheriting from her; and the rule seems to be that, to enable the husband to be tenant by the curtesy, the wife must have such seisin as will enable her issue to inherit from her: Cruise Dig. 112, s. 24.

Now, in all the cases in which an actual seisin of the wife has been held necessary, it will be found that she claimed either as heir or devisee, and not by virtue of a deed or conveyance to which effect is given by the statute of uses. Where the statute executes the estate, as is said by Blackstone, 2 Com. 238, the party intended to be benefited is put at once into corporal possession of the land, without ever having seen it, by a kind of parliamentary magic. Here the wife did not claim as heir or devisee, but under a deed from Cadwallader Colden; and I apprehend, with the counsel for the plaintiff, that no actual entry was necessary in order to enable her heirs to take, or her husband to be tenant by the curtesy.

I am accordingly of opinion that the plaintiff is entitled to recover in both causes.

SAVAGE, C. J. I propose to consider the rights of the parties at the several different stages of their title. In 1787, the title to the premises in question, and other lands, is admitted to have been vested in the people of this state. The act of that year was a conditional grant of these lands to C. Colden, in trust for the heirs of D. Colden. The title, however, did not vest until the conditions were performed, which was in February, 1790. O. Colden was authorized to sell the lands to reimburse advances, which it was contemplated he would make, and in fact did make. He took the legal estate, and the heirs only an equitable one. In May, 1790, he contracted to sell the

premises in question to Rogers. This contract he had a right to make, and was in fact the only person who could convey the title. The defendant, Johnson, went into possession as assignee under the contract, and acquired an equitable interest in the land; but his possession was surely not adverse to the true title. He was considered in law a tenant at will to the owner of the estate, C. Colden.

Such was the relation of the parties till the fifth of November, 1792, when C. Colden, who had in 1790 been reimbursed his advances, put an end to his trust by conveying the legal estate to the children of D. Colden. Between the trustee and *estuis que trust* there was no difficulty. Their title was the same. Before the conveyance of 1792 they severally held different component parts (if I may so express it) of the same title. The legal estate was in C. Colden, while the equitable estate rested in the heirs of D. Colden. His (C. Colden's) acts were valid and binding upon those heirs; and when he conveyed to them the legal estate, they took it subject to such equitable interests as the defendant and others had acquired in the lands by virtue of the acts of the trustee. So far from an adverse possession, which would invalidate the conveyances from C. Colden to the heirs, there existed a tenancy: 4 Johns. 230. That relation was transferred from the trustee to the heirs. They might have enforced the performance of the contract, and were bound on their part to give the title on the terms and conditions contained in it.

While such were the relations between these parties, the defendant, Johnson, on the thirteenth of December, 1793, received a deed from Cooper as attorney for C. Colden. At this time C. Colden had no interest in the lands; and as the defendants are presumed to have been connusant of the conveyance in 1792, receiving this deed was an act of disloyalty to the true landlords; and may, therefore, be considered with propriety the commencement of a holding adverse to the title of the lessors.

It is contended that the execution of the deed is evidence of the performance of the contract by the defendants; and so it would be, undoubtedly, if it had been given by the owner of the title in pursuance of the contract. But under the circumstances of this case the deed of C. Colden can have no more legal operation upon the title of the defendant than if it had been executed by John Stiles. It evinces, however, an intention to hold under a title hostile to that of the lessors, and is

therefore adverse. That a possession taken at first under the true title may subsequently become adverse, seems to be conceded by several decisions of this court: 1 Cowen, 610; 18 Johns. 448. And this, I apprehend, is an exception to the rule as we find it laid down in *Brandt v. Ogden*, 1 Johns. 156, that the possession must be adverse in its inception. After the thirteenth of December, 1793, the defendant claimed the entire title, exclusive of any right in another, and this claim was in hostility to the title of the lessors. Whether Mrs. Cooper had a right of action against the defendant on the execution of the deed to her, in 1792, would depend on the payment of the interest by the defendant. Supposing that to have been done, which we are warranted in assuming, as the case is silent on the point, it follows that Mrs. Cooper had no right of action against the defendant until December 13, 1793, when he disclaimed her title by taking a deed from another and, as respects the rights of the parties, a stranger.

I assume then, what to me seems undeniable, that on the thirteenth of December, 1793, the defendant's possession became adverse, and that the statute of limitations would then have commenced running but for the disabilities of Mrs. Cooper. At this time she was an infant and a *feme-covert*; and it is perfectly well settled, that if several disabilities exist when the right of action accrues, the statute does not begin to run till the party has survived them all: 3 Johns. Ch. 138; 1 Plowd. 375. It is equally well settled that cumulative disabilities cannot be allowed. Two disabilities were existing when the right of action accrued: infancy and coverture; and the proviso in the statute gives ten years in which an action may be brought after such disabilities are removed. The last of these disabilities was removed by the death of Mrs. Cooper, in July, 1797. Her infancy had ceased in November, 1796.

According to the construction given to the statute: 3 Johns. Ch. 137, the party has, in every event, twenty years to make his entry; and if under disability when the right accrues he has ten years and no more after the disability ceases. If twenty years were not to be allowed, and the heirs of Mrs. Cooper were confined to ten years after the death of their mother, their right would have been barred in 1813, though the twenty years would not expire till 1817. But as the statute did not intend to place those persons named in the proviso in a worse condition than those who were under no disabilities whatever, it is a reasonable construction of the statute that twenty years shall be allowed them

at all events. It may happen that this proviso will give to some thirty years, while others, under similar disabilities, may have but the twenty years. Such would be the situation of the lessors of the plaintiff were there no intervening life-estate to suspend further the operation of the statute.

It becomes important, then, to inquire whether Thomas Cooper was tenant by the curtesy; and if so, what effect the existence of his life-estate has upon the rights of the parties. To constitute this estate, four things are necessary: marriage, seisin, issue born alive, and the death of the wife. The marriage in this case took place on the seventh of April, 1792. According to the view I have taken, the wife became seised of the legal estate on the fifth of November, 1792. She had one child in 1793, and another in 1795; and died in 1797, when the husband's estate became perfect.

It is objected, however, that the wife could not have that seisin in fact which is necessary to make the husband tenant by the curtesy. It has been settled by this court, in the case of *Jackson v. Sellick*, 8 Johns. 269, that a wife who had a legal title to wild and uncultivated lands had such a seisin as was sufficient to constitute her husband tenant by the curtesy. Here, however, there was an actual entry by the tenant of the wife; for it has also been adjudged by this court, that a purchaser by contract holds as tenant at will. It is immaterial at what period during coverture the wife becomes seised, whether before issue or after. Nor is it material whether the issue be living at the time of the seisin. So, if the wife be seised and disseised before issue, yet if she have issue after the disseisin, the husband shall hold as tenant by the curtesy: Co. Lit. 29, 30. The husband's title does not become perfect till the death of the wife, though, for some purposes, it is supposed to commence at the birth of a child. He is then called tenant by curtesy initiate, but not consummate, till the death of the wife.

Assuming, then, that there was such seisin in Mrs. Cooper as entitled her husband to hold as tenant by the curtesy, it becomes necessary to inquire whether the existence of that estate prevents the operation of the statute of limitations. In *Jackson v. Schoonmaker*, 4 Johns. 402, it was decided that "neither a descent cast, nor the statute of limitations will affect a right if a particular estate existed at the time of the disseisin, or when the adverse possession began; because a right of entry in the remainder-man cannot exist during the existence of the particular estate; and the laches of a tenant for life will not affect

the party in title. An entry, to avoid the statute, must be an entry for the purpose of taking possession; and such an entry cannot be made during the existence of the life-estate." In that case the disseisin happened after the tenancy by the curtesy was consummate; and hence possibly the peculiar phraseology of the court, when they say: "If a particular estate existed at the time of the disseisin, or when the adverse possession began." I apprehend the doctrine is equally true that the right of a reversioner or remainder-man is not affected by the statute, if the particular estate existed when the right accrued. And the same reason may be given for the one as the other, because the right of entry never existed in him, in reversion or remainder, during the continuance of the particular estate. When did the statute become operative? Not till the death of Mrs. Cooper, as that event terminated the coverture. But the same event which subjected her heirs to the operation of the statute, consummated the particular estate which precluded them from any right of entry: *Et impotentia excusat legem*.

Before the statute can, by any reasonable construction, be made to operate, there must be some laches on the part of those asserting a right of entry; and the policy of the statute gives to every claimant at least ten years within which laches shall not be imputed. At what period of time, I would ask, was it in the power of the heirs of Mrs. Cooper to have asserted their rights before 1817, when Thomas Cooper died? Their infancy, I admit, is no excuse for them, as successive disabilities are not allowed. The statute was not operative till the death of Mrs. Cooper. It is true, indeed, that more than twenty years have elapsed since the adverse possession commenced; and more than ten years since the last disability was removed, which existed when the disseisin took place; but I would ask, when were the claimants guilty of laches? They were not bound to make an entry, or claim, till the death of Mrs. Cooper. And from that period till the death of the tenant for life, the law would not permit them to enter. Shall laches, then, be imputed to them? Certainly not. Whether Golden Cooper was born before or after the disseisin, seems to me not to change the rights of the parties. The lessors of the plaintiff have brought their action within ten years after the operation of the statute upon their claim, and are not barred by it. Having, in my opinion, shown a right to one fourth of the premises, they are entitled to judgment for so much.

WOODWORTH, J., (dissenting in the first cause): I am of opinion that a legal title, to one undivided fourth part of the premises in question, was conveyed to Catharine Cooper by the deed from Cadwallader Colden, of the fifth of November, 1792. At this time the possession held under a contract to sell, given by Wm. Cooper, as attorney for Cadwallader Colden, was not adverse, because the purchase rested in contract, and the conditions were not yet performed. An adverse possession cannot commence under a contract to purchase, as has been frequently decided upon reasons fully assigned. The adverse possession of Johnson commenced December 13, 1793, when Cooper conveyed to him. At that time Catharine Cooper was an infant and *feme-covert*. She died in July, 1797, leaving a son born in 1793, since dead without issue; and Alice, one of the lessors of the plaintiff, born September 30, 1795.

The question is, whether the plaintiff is bound by the statute of limitations. It is contended that Mrs. Swartwout had but ten years from the death of her mother to bring a suit, because Thomas Cooper was never tenant by the curtesy, and consequently there was no suspension of the statute. The argument is founded on this, that it does not appear that Colden Cooper was born before the deed executed to the defendants; and if he was not, it is contended that there was not such a seisin in the wife as would make the husband tenant by the curtesy; or, in other words, that it must be an actual seisin, after the birth of issue, and that a previous seisin, during the coverture and before issue, is insufficient. The law on this subject is otherwise. According to Lord Coke, if a man takes a woman seised of lands, and is disseised, and then has issue, and the wife dies, he shall enter and hold by the curtesy: 1 Cruis. Dig. 107, ch. 1, s. 11; Id. 112, s. 25. So that whether the birth of Colden Cooper was before the deed of 1793 or not, is immaterial as to the question whether Thomas Cooper was not tenant by the curtesy at some period during the coverture. Mrs. Cooper did not take as heir or devisee, in which cases it might be necessary for her to make an actual entry in order to enable her heir to take by descent, or her husband to be tenant by the curtesy. The title was not cast on her by act of law, but she took under a deed, to which effect is given by the statute of uses, by which she was put in corporal possession, there being no adverse holding at the time: 2 Bl. Com. 312, 338; 1 Inst. 29.

But admitting this proposition to be correct, the material point is this: when did the right of entry first accrue; and what

were the existing disabilities at that time? The answer is, the adverse possession commenced December 13, 1798. The only disabilities then existing were infancy and coverture. No tenancy by the curtesy existed at that period, for it is not shown that Colden Cooper was then born. The birth of a child is necessary to constitute this estate. The husband at that moment had no estate that could be continued beyond the coverture, for on the death of his wife without issue the estate would immediately have descended to her heirs. Whether he would ever have a greater right was altogether contingent and uncertain. He had not even an inchoate right as a tenant by the curtesy; consequently the proviso in the statute applied to coverture and infancy only, and gave ten years after those disabilities were removed. But the party has, in any event, twenty years to make his entry, and as Mrs. Cooper died in 1797, four years after her disseisin, the effect of the proviso would be to give her heirs sixteen years after her death. The sixteen years ended in 1813. The law is well settled that the right of entry is not barred until all the disabilities existing when the right of action accrued are removed; that there can not be cumulative disabilities, for when the statute first begins to run, all subsequent disabilities are disregarded. It is, then, evident, that although Thomas Cooper afterwards became a tenant by curtesy, it does not interpose any additional barrier to prevent operation of the statute. The following authorities establish the doctrine laid down: 3 Johns. Ch. 129; 18 Johns. 44; 8 Id. 262; 2 Conn. 27; 6 East, 80; 4 Mass. 182; Plowd. 353. As the deed to the defendant, Johnson, bears date December 13, 1793, and by the testimony of Cadwallader D. Colden it appears that Colden Cooper was born in 1793, it is highly probable that his birth was previous to the disseisin. Had this been shown, then Thomas Cooper would have had a contingent estate as tenant by the curtesy, and in the event of his surviving his wife, it would have become absolute. But on the facts before us, I am of opinion that the defendant, Johnson, is entitled to judgment.

Judgment for the plaintiff in both causes.

THIS DECISION is approved and followed in *Jackson v. Moore*, 6 Cow. 727; *Jackson v. Mancius*, 2 Wend. 369; *Fogal v. Pirro*, 10 Bosw. 113, on the point that the statute of limitation does not run against the heir during the continuance of the tenancy by curtesy; and in *Thorp v. Raymond*, 16 How. U. S. 250, as determining that successive disabilities cannot be added to take a case out of the statute. Upon the various questions relating to what con-

stitutes an adverse possession, the principal case is repeatedly referred to. In *Jackson v. Miller*, 6 Cow. 755; *Bradstreet v. Clarke*, 15 Wend. 180; *Kellogg v. Kellogg*, 6 Barb. 122; *Fosgate v. Herkimer Mfg. Co.*, 12 Id. 356; *Vrooman v. Shepherd*, 14 Id. 454; *Chalmers v. Wright*, 5 Rob. 77, it is cited as showing that the possession of one entering under a contract of purchase is not adverse to the true owner; in *Towle v. Palmer*, 1 Abb. N. S. 111; to be adverse, must be exclusive; in *Bowie v. Brahe*, 3 Duer, 40; *Stevens v. Watson v. N. Y. Cent. R. R. Co.*, 6 Id. 97, as showing that the possession, *Rhineland v. 5 Rob. 311*; and *Wilklow v. Lane*, 37 Barb. 250, that the possession under a claim of title and a disclaimer of title in the plaintiff. In *Bradstreet v. Pratt*, 17 Wend. 46, the life-tenant is not permitted to do any act to the prejudice of the remainder-man, and the principal case relied upon.

TENANCY BY THE CURTESY can exist only where the wife has been seised of lands during coverture, has had issue capable of inheriting, and has died leaving her husband surviving: the principal case, 1 Wash. Real Prop., sec. 128, *et seq.* The seisin must have been in fact and in deed, the seisin in law of an estate of inheritance is not sufficient: *Taylor v. Gould*, 10 Barb. 400. This statement, which the last cited case quotes from *Jackson v. Johnson*, is thus explained in *Adair v. Lott*, 3 Hill, 186: The doctrine that there must be a seisin in deed in the wife to support a tenancy by the curtesy applies only to the case where seisin is not complete before entry, as where she takes as heir or devisee, not where she takes by a conveyance which passes the legal title and seisin. Nor is it necessary that the seisin should be of a legal estate of inheritance; it may be of an equitable one: *Taylor v. Smith*, 54 Miss. 50; *Cushing v. Blake*, 29 N. J. Eq. (2 Stew.) 399. If the legal requisites to such an estate exist, the husband will, on his wife's death, be entitled to his curtesy: *Porch v. Fries*, 13 N. J. Eq. (3 C. E. Gr.) 204. So that a husband will be entitled to hold as tenant by the curtesy lands which he has conveyed to trustee for the sole and separate use of his wife and her heirs forever: *Frazer v. Hightower*, 12 Heisk. 94; *Ege v. Medlar*, 82 Pa. St. 86, where the conveyance contained a power in the trustee to sell the lands, and pay the proceeds to the wife, but the power was not executed. And where by marriage settlement the husband conveys property to trustees for the sole benefit of the wife during coverture, free from his debts, with power in the wife to dispose of the same by will or deed, he will have his curtesy if she die without executing the power: *Jones v. Brown*, 1 Md. Ch. 191. The same principle is enforced in *Baker v. Heiskell*, 1 Cald. 641, although in this instance the wife derived her equitable estate with power to dispose thereof from a decree of the court of chancery. And where the wife holds lands as beneficiary under a will, with power of appointment, the trust to terminate upon the husband, he will be tenant by the curtesy, if he survive her, and she has made no appointment: *Payne v. Payne*, 11 B. Mon. 138. Had the power been exercised, the husband would have lost his curtesy: *Pool v. Blakie*, 53 Ill. 495; *Morgan v. Morgan*, 5 Gill & J. 395; *Stewart v. Ross*, 50 Miss. 776, in which Judge Simrall reviews many of the incidents of this estate. Speaking for the court, he says: "The interest of the wife must be such, that the husband may have seisin in her right: Bacon Abr., title Curtesy. If there be an outstanding particular freehold estate which does not fall into the inheritance during coverture, there is not such a seisin and right of immediate possession as will support the estate of curtesy: *Radus v. Hayden*, 43 Miss. 633, 636; *Malone v. McLaurin*, 40 Id. 162. The seisin must be accompanied with possession, or the right of immediate possession, and such entry could be made by the voluntary act of the husband: Id." In

Sayers v. Wall, 26 Gratt. 354, it was determined that a conveyance from a husband to his wife, though invalid at law, was good in equity, and it being absolute, vested in her a separate estate, thereby defeating his right to curtesy.

The possession of one coparcener will be a sufficient seisin in fact by another to entitle the latter's husband to curtesy, although the wife may never have been in the actual possession of the premises: *Carr v. Givens*, 9 Bush, 679.

THE BIRTH OF A CHILD capable of inheriting the estate is essential to tenancy by the curtesy: the principal case, 1 Wash. Real Prop., sec. 140. But it is immaterial whether the child is born before or after the estate is acquired, as in either case it would inherit: *Stewart v. Ross*, 50 Miss. 776. Nor can an adverse possession of the lands at the time the child was born defeat the husband's estate: *Guion v. Anderson*, 8 Humph. 307. It is important, further, that the child should be born alive in the life-time of the mother to entitle the father to the estate. Even the delivery of the child alive, by the Cæsarean operation, after the death of the mother, is not sufficient: *Marsellis v. Thalheimer*, 2 Pai. 42. Upon the birth of a child capable of inheriting the husband becomes tenant initiate, and such an estate is sufficient to recover upon, in an action of ejectment: *Billings v. Baker*, 28 Barb. 367.

JACKSON EX DEM. VAN SCHAICK v. DAVIS.

[5 COWEN, 123.]

THE LOSS OF A PAPER OR THE DEATH OF A WITNESS may, for the purpose of laying the foundation for secondary evidence, be proved by a witness interested in the cause, or even by one of the parties.

AN OBJECTION TO THE ADMISSION OF EVIDENCE, not taken, or, if taken, not persisted in at the trial, can not be taken on appeal, if it was of such a character that further evidence might remove it.

AN ANCIENT DEED, more than thirty years old, may be read in evidence without proof of its execution, if it be first shown that possession of part of the premises conveyed was taken and held under it, though such part does not include the lands in controversy.

ADMISSIONS AND DECLARATIONS OF PERSONS IN POSSESSION of lands are evidence against their successors in interest.

THE RELATION OF LANDLORD AND TENANT once established attaches to all who succeed to the possession, through or under the tenant, immediately or remotely.

THE GRANTER OF A TENANT, though he received a deed absolute, enters, in contemplation of law, as tenant of the lessor.

NON-PAYMENT OF RENT, or failure to demand rent, for twenty years, does not create a presumption of the conveyance or extinguishment of the landlord's title.

PAROL DISCLAIMER OF TITLE TO REAL PROPERTY can not be received in evidence to destroy or take away a title.

A TENANT'S CONVEYANCE IN FEE is a disseisin of the landlord, or not, at the election of the latter.

DISSEISIN BY TENANT.—A tenant cannot, against the will of his landlord, constitute himself a disseisor.

EJECTMENT. Verdict for the plaintiff subject to the opinion of the court upon a case stated. The opinions state the case.

S. G. Huntington and Van Vechten, for the plaintiffs.

J. A. Viele and S. A. Foot, contra.

By Court, SUTHERLAND, J. This action is to recover lot No. 4, and the one half of lot No. 3, in the Half-moon, or Van Schaick patent. The lessors of the plaintiff produced a lease of lot No. 4, from Christine Van Schaick, and John G. Van Schaick, and Anna, his wife, to Alexander Brevoort, dated January 1, 1784, for seventy years, reserving an annual rent of four pounds. This lease was duly acknowledged and recorded. They also offered in evidence, a lease of lot No. 3, from the same lessor, to John C. Counel, of the same date, for the same term, and reserving the same rent. This lease was not recorded; and one principal question in the case is, whether it was sufficiently proved to entitle it to be admitted in evidence. The death of one of the subscribing witnesses was proved by Guert Van Schoonhoven; and Aaron Lane was offered as a witness to prove the death of the other. He was objected to, on the ground of interest; and it was admitted that his wife was interested in the Van Schaick patent; and that he had agreed to pay his proportion of the expense of this and other suits which might be commenced to try the Van Schaick title. He was, however, admitted by the judge, and proved the death of the other subscribing witness to the lease. The plaintiff then proved the signature of Connell, the lessee, to the lease. The defendant still objected to the reading of the lease, without further proof of its execution; and the plaintiff undertook to prove twenty years possession under the lease. After the evidence on this point was concluded, he rested his cause; and the defendant moved for a nonsuit, on the ground that the plaintiff had not proved the payment of any rent within twenty years. The court denied the motion, and decided that the evidence was *prima facie* sufficient to entitle the plaintiff to recover one third of the premises, on the demise of John G. Van Schaick.

The defendant then went into proof of the proceedings under the act of March 11, 1793, to ascertain and settle the limits and boundaries between the patent of Kayaderosseras, the patent of Half-moon or Van Schaick patent, and the patent of Clifton Park. It was admitted that according to the decision of the commissioners under that act, the premises in question were in the patent of Clifton Park; but the constitutionality and valid-

ity of that act, so far as it affected the rights of the plaintiff, were denied.

A verdict was taken for the plaintiff, subject to the opinion of the supreme court.

1. Lane was a competent witness. Evidence of the loss of a paper, or the death of a witness, is addressed to the court for the purpose of laying a foundation for the admission of secondary evidence; and it is well settled that it is no objection to a witness, when offered with this view, that he is interested in the cause, or even that he is a party to the record: 1 Bl. 532; 2 Dall. 116; 16 Johns. 193; 20 Id. 144.

2. The objection to the proof of the execution of the lease by Connell, for lot No. 3, as the case stands, appears finally to have been abandoned by the defendant. After the death of the subscribing witnesses, and the signature of Connell, to the lease, were proved, the defendant objected to the sufficiency of the proof. The case states that the plaintiff thereupon undertook to prove twenty years' possession, and upwards, under the lease; and after stating the evidence given, says: "The plaintiffs here rested their cause, and the defendant thereupon moved for a nonsuit on the ground that the plaintiffs had not proved the payment of any rent within twenty years." The very ground for the application of a nonsuit presupposes the lease to have been proved; and seems to admit that the plaintiff had succeeded in making out the twenty years possession in correspondence with the lease; but that the fact of tenancy, which might be inferred from the proof, was rebutted by the circumstance that no rent was proved to have been paid within twenty years; that a surrender of the lease was therefore to be presumed. There is nothing in the case to show that the sufficiency of the proof of the lease was finally objected to by the defendant. If the objection was not taken or persisted in upon the trial, it cannot be taken here; for it is of a nature which might have been removed by further evidence.

But I am inclined to think there was sufficient evidence of a possession accompanying the lease to entitle it to be read as an ancient deed, it being more than thirty years old: Phil. Ev. 349; 3 Johns. 292. John C. Connell, the lessee, died in 1801, and Isaac Connell, his son, testified that at the time of his death he was in possession of that part of lot No. 3 which Nehemiah Davis owned and occupied at the time of the trial. Joshua Mandeville testified that the defendant admitted to him that he had sold the south half of No. 3 to his son Nehemiah. Mandeville

also testified that in the spring of 1823 Nehemiah was in possession of the south half of No. 3, and claimed compensation for damages done to the south half in laying out a road through it. This evidence conclusively establishes that John C. Connell, the lessee, died in possession of the south half of No. 3 in 1801. Samuel Stewart testified that, as administrator of the estate of John C. Connell, he, in 1801, sold a leasehold estate in the half of lot No. 3 to the defendant; that he either gave him a quitclaim deed or assigned the lease. He presumed that he assigned the lease, though he was not confident. It was a lease from the Van Schaicks to Connell for a term of years. The sale from the defendant to his son, Nehemiah, of the south half of lot No. 3, and his possession down to the time of the trial, complete the evidence of a possession of the south half under and consistent with the provisions of the lease, and would seem to bring it within the rule which entitles an ancient deed to be read without proof of its execution.

But it is objected that the possession proved does not extend to the north half of No. 3, the premises in question. Let it be recollected that the question now is, whether the Van Schaicks ever gave a lease to Connell for lot No. 3; not whether the defendant holds under that lease. That will be subsequently considered. Now I apprehend that it cannot be necessary, in order to entitle an instrument to be read as an ancient deed, to prove a corresponding possession of every portion of the premises which it purports to convey. A possession of part under the deed, affords evidence of its authenticity of as high a character as though that possession extended to the whole. I am, therefore, inclined to think that this lease was entitled to be read as an ancient deed.

But, again, the defendant admitted to Mandeville that both lots, Nos. 3 and 4, were leased by the Van Schaicks, and that one of them was leased to Connell, and that he purchased that lot from Connell. And the testimony of Stewart shows that the defendant purchased from the estate of Connell a leasehold interest only in lot No. 3 under the Van Schaicks, and he believes that interest was conveyed to him by an assignment of the lease given by the Van Schaicks to Connell. Is not the defendant then concluded from denying that lot No. 3 was originally held by Connell under a lease from the Van Schaicks? And the only object of introducing the lease was to prove that fact. It is true the defendant at the same time denied that the Van Schaicks had any title to the lot, or that he owed them any

rent. The bearing and effect of that denial will be considered hereafter.

Andrew Brevoort appears to have immediately entered into possession of lot No. 4 under his lease, and also to have been in possession of the north half of lot No. 3 previous to 1792, when he died. Richard Davis testified that in 1792 he purchased from the representatives of Brevoort lot No. 4 and the north half of lot No. 3; that he purchased it as land leased by the Van Schaicks; that he soon after sold it as such to Stephen Van Denburgh, and assigned the lease to him; and various sales and transfers are proved, until it came into the possession of the defendant, about twenty-five years before the trial. This evidence shows conclusively that the defendant derived the possession of lot No. 4 and the north half of lot No. 3 from persons who acknowledged that these lots were leased by the Van Schaicks, and that they held as their tenants. The testimony of Isaac Connell and Richard Davis, and the defendant's admissions to Mandeville, show a clear and explicit acknowledgment of the Van Schaick title. The defendant is as much affected by the acts and acknowledgments of his predecessors in the possession of the premises as though they were his own: *Davies v. Pierce*, 2 T. R. 53; 1 Id. 760, note; Woodfall, 484; 1 Caines, 444; 2 Johns. Cas. 223; 3 Johns. 223, 449.

When the relation of landlord and tenant is once established, it attaches to all who may succeed to the possession, through or under the tenant, either immediately or remotely; but, it is said, that although a person succeeding a tenant is presumed to have taken as tenant also, yet he may repel that presumption, by showing that he did not take in that character, and that the testimony of James Davis, in this case, shows that the defendant purchased the premises in question, not as leasehold property, but in fee absolute. Davis's testimony upon this point is by no means explicit. He states that he made the contract for the farm on behalf of the defendant; that Teachout, the vendor, possessed and claimed it as his own; that he said he had a good title and would give a good deed, but whether he gave a deed with covenants of warranty, or only a quitclaim does not appear. Admitting, however, that he purchased and entered upon the premises under an absolute conveyance in fee, he still, in judgment of law, entered as the tenant of the Van Schaicks. This precise point arose in the case of *Jackson v. Seissam*, 3 Johns. 499. The fact of tenancy in that case was made out by proof of the confessions of one Smith (from whom the defendant

derived the possession), that he entered under one of the lessors of the plaintiff. The defendant, to repel the presumption that he entered in the same character, produced and proved a deed from Smith to him, for the consideration of three hundred pounds, with full covenants, and there was no evidence that the defendant knew, or had any reason to suppose that Smith derived his possession from the lessor, and yet the court held that Smith's acknowledgments, if they were evidence of a tenancy in him, were conclusive against the defendant. Indeed, that point was not disputed, and is too clear upon principle, as well as authority, to admit of discussion: *Jackson v. Cole*, 4 Cowen, 587. But, it is said, that admitting the defendant and those from whom he derived his possession to have entered under the Van Schaicks, an abandonment of the title on the part of the Van Schaicks, is to be presumed, inasmuch as there is no proof of the payment of rent, or any acknowledgment of tenancy within twenty years. Satisfaction of the rent might possibly be presumed as payment of a bond, will be, after a forbearance of twenty years, unexplained on the part of the obligee. So, where a mortgagee has never entered into possession of the mortgaged premises, and no demand or payment has been made of either principal or interest for twenty years, it has always been held sufficient to warrant the presumption that the mortgage has been satisfied: Bull. N. P. 110; 3 Johns. 386; 7 Id. 283; 12 Id. 242; 1 Phil. Ev. 119, note (a). But the analogy between this case and those of bonds and mortgages, appear to me to be confined to the rent, and not to extend to the title of the landlord. There is a material distinction between the presumption of the payment of money, and the execution of a release, or the extinguishment of a right to rent, which can only be by deed. Payment is presumed, after a great lapse of time, in analogy to and upon the principle of the statute of limitations, because the evidence of the fact may reasonably be presumed to be lost; but where the relation of landlord and tenant is once established under a sealed lease, the mere circumstance that the landlord has not demanded the rent cannot justify the presumption that he has extinguished his right to it, by a conveyance of the interest in remainder or reversion to his tenant. The presumption sought to be indulged in this case is not a presumption at law, which can not be contradicted; but is a presumption in the nature of evidence, and mere length of time will never raise such presumption. It must arise from some facts or circumstances which took place within that time: Woodfall, 487; Runn. 276; 2 Burr. 1071.

Now, here there are no such facts or circumstances, but, on the contrary, all the circumstances in the case tend to repel such presumption. It can not arise from the defendant's possession, for that is consistent with the title of the lessors of the plaintiff as landlords; nor from the decision of the commissioners, that the premises in question were in the Clifton Park patent, for if their award was legally binding and operative upon the lessors, so as to transfer their title, whatever it might be, to the proprietors of Clifton Park patent, then there is neither necessity nor room for the indulgence of presumptions of any kind. If the award was not binding upon the lessors, then the fact of its having been made can not justify or raise a presumption that they have abandoned any right or interest which may previously have belonged to them. Every presumption of this kind is repelled by the acts of the defendant himself. It is in proof that he repeatedly denied the title, both of the Van Schaicks and the proprietors of Clifton Park, and claimed the premises in question, on the ground of possession merely, as being part of a gore between those patents, and covered by neither. He never pretended to claim under the award of the commissioners, on the ground of a release or conveyance from the lessors of the plaintiff, in accordance with it.

This does not fall within the class of cases where a release or conveyance is to be presumed, for the purpose of quieting the possession. The defendant's possession as tenant is not inconsistent with the plaintiff's title; and it still comes back to the inquiry, whether, admitting him to have come into possession as tenant, an extinguishment of the landlord's right is to be presumed from the mere circumstance that no rent has been demanded within twenty years. The case of *Eldridge v. Knott*, 1 Cowp. 214, is very much in point. It was there held that a release or extinguishment of a quitrent, is not to be presumed from mere length of time, short of fifty years, the period fixed by the statute as a bar to the demand. And the reasoning of Lord Mansfield and Mr. Justice Aston, shows conclusively that, under the circumstances of this case, no such presumption can be indulged. In *Jackson v. Welden*, 3 Johns. 283, which was a case very similar to this, and involved a question of title between the Van Schaick and Kayaderosseras patents, under the act of 1793, the plaintiff attempted to recover on the ground of the tenancy of the defendant. But it appeared that the defendant, after the commissioners had decided that his lot belonged to the Kayaderosseras, and not to

the Van Schaick patent, under which he originally entered, had purchased from the Kayaderosseras proprietors. It also appeared that the lessor of the plaintiff had declared that he had given up all claim to the land, and that he did not blame the defendant for having purchased under the Kayaderosseras patent; that he had exacted no rent after the determination of the commissioners; and that with a full knowledge that another of the tenants had agreed to purchase under the Kayaderosseras patent, he told him that a title under that patent would be valid. The court held that under the circumstances of that case the lessor of the plaintiff must be deemed to have been privy to, and to have assented to the defendant's attornment to the proprietors of the Kayaderosseras patent; and that such an attornment being valid under the statute, terminated the tenancy; and that the plaintiff therefore could not recover, on the ground of the prior tenancy of the defendant, but must produce his title.

Joshua Palmerton was offered in the principal case to prove that after the decision of the commissioners, and before the defendant went into possession, one of the lessors of the plaintiff told the witness that they had lost their title by that decision; and that they did not now claim, or receive rent for any of the lands lying north-west of the line settled by the commissioners; and that they declined for that reason to sell the witness a lot which they formerly claimed, lying in the gore. This evidence, I think, was properly rejected by the judge. The defendant did not pretend to claim under the Clifton Park patent, in pursuance of the award of the commissioners. He had taken no title under the proprietors of that patent, the lessor's assent to which might be presumed from the evidence offered connected with other circumstances in the case, and thus create a valid attornment; but he claimed in hostility to both patents. In *Jackson v. Welden*, the abandonment which it was held might be presumed, was in favor of the Kayaderosseras patent, in conformity to the award of the commissioners; for the defendant had purchased under that patent, and the plaintiff was driven to proof of his title, in order that the defendant, if evicted, could have his remedy on his covenant against the Kayaderosseras proprietors. In this case, the declarations offered to be proved were not made to a tenant, but to a stranger. They are not shown to have been communicated to the defendant, or to have influenced his conduct. It would be dangerous to permit the title to real estate to be affected by such casual declarations

made to persons, and under circumstances which did not impose upon the party any peculiar obligation to speak with caution and accuracy. In *Jackson v. Vosburgh*, 7 Johns. 186, the defendant, who was shown to have entered as tenant, offered to prove that the lessors had disclaimed any right to the premises; and that he had been in the actual possession of the premises, in his own right, for more than thirty years before the bringing of the suit. The court say, such a disclaimer as was there set up would be of no validity; and such evidence, if admissible, would lead to fraud and perjury, and be destructive of title to property; and it was held inadmissible even for the purpose of disproving the fact of tenancy, although the thirty years of possession under claim of title was held admissible for that purpose. *Jackson v. Kisselbrack*, 10 Johns. 336 [6 Am. Dec. 341]; and *Brant v. Livermore*, Id. 358, reiterate the doctrine that evidence of a parol disclaimer of title to real property is inadmissible. In *Jackson v. Cary*, 16 Johns. 305, Chief Justice Spencer says that although parol declarations of tenancy have been received with certain qualifications, parol proof has never yet been admitted to destroy, or take away a title; and that to allow parol evidence to have that effect would be introducing a new and most dangerous species of evidence, in direct hostility to the principle of the statute of frauds: 6 Johns. 21; 4 Cruise Dig. 367; *Jackson v. Cole*, 4 Cow. 587.

The point of adverse possession was substantially abandoned upon the argument. If the defendant entered as tenant of the Van Schaicks, and there has been no abandonment of their title, as I have endeavored to show, nor any act of disloyalty on the part of the defendant, and none is shown until he refused to pay rent when demanded by Mandeville, in 1822, then there could be no adverse possession.

The conveyance in fee of the tenant, was a disseisin of the landlord, or not, at his election. For the sake of his remedy, he had a right to consider the grantee a disseisor. But he can not constitute himself a disseisor in spite of his landlord. Lord Mansfield says, in *Taylor v. Horde*, 1 Burr. 112: "If the lessee, for life or years, makes a feoffment, the lessor may still distrain for the rent; or charge the person to whom it is paid as a receiver; or bring an ejectment, and choose whether he will be considered as disseised." And he remarks that, except the special case of fines with proclamations, and the constructions of the statute of 4 Hen. VII. ch. 24, for the sake of the bar, he can not think of a case where the true owner, whose entry is

not taken away, may not elect, by pursuing a possessory remedy, to be deemed as not having been disseised.

[The court then entered upon the examination of certain local statutes, which, being of no general interest, is omitted.]

Judgment for the plaintiff.

Cited in *Jackson v. Harsen*, 7 Cow. 325, on the point that a purchaser from a tenant will take the land as tenant of the lessor of the grantor, although the purchaser may not have known of the tenancy: in *Jackson v. Vincent*, 4 Wend. 638; *Cole v. Patterson*, 25 Id. 458; *Tyler v. Heidon*, 46 Barb. 460; *Lyon v. Chase*, 51 Id. 16, and in *Perkins v. Currier*, 3 W. & M. 96, on the point that although payment of rent may be presumed after the lapse of twenty years unexplained, yet the mere length of time is not sufficient to warrant a presumption of an execution of a release from the lessor to his lessee; in *Munro v. Merchant*, 26 Barb. 408, in regard to a presumption of a conveyance arising from circumstances where a link in the chain of title is missing; in *De Lancey v. Ganong*, 9 N. Y. 24; *Dodge v. Lambert*, 2 Bosw. 578, as showing that the tenant can not by any act or declaration deny his landlord's title, and render his possession adverse to that of the reversioner; in *Hoag v. Hoag*, 35 N. Y. 471, as establishing the principle, that while a tenant will not be permitted to deny his landlord's title, yet he may show that it has terminated either by its original limitation, or conveyance, or judgment, or by operation of law. The principal case is also referred to in *Hewlett v. Cock*, 7 Wend. 376; *Corbin v. Jackson*, 14 Id. 626, on the admissibility against the grantee, of the declarations of a grantor in possession; and in *Gregory v. Dodge*, 14 Id. 617, as authority that evidence offered and not objected to is considered as admitted by consent.

DISSEISIN BY TENANT.—That a tenant is estopped to deny the title of his landlord is a general principle firmly established: Bigelow on Estop., 343 *et seq.*; Taylor on Land. and Ten., sec. 629. It is affirmed, together with the incidents which flow from the doctrine, in *Bertram v. Cook*, 32 Mich. 518, 521: "It has been repeatedly decided in this state, that a person who has obtained possession of premises under a lease can not dispute his landlord's title. He can not, by his own act merely, change the tenure so as to enable himself to hold against his landlord, nor can he, during the continuance of the tenancy, make a valid attornment to a third person, without his landlord's consent, or buy in an outstanding title. Having obtained possession as tenant, he can do no act inconsistent with, or which would change the relation existing between himself and his landlord, without first yielding and delivering up to the latter possession of the premises which he acquired from him. The landlord has a right to rely upon the relation as a protection. To permit the tenant to do otherwise would be holding out inducements to him to take advantage of his position for his own benefit and to the injury of his landlord. The law very wisely, therefore, holds all such agreements as being contrary to public policy and void, and sternly refuses to permit the person entering under such an agreement, from obtaining any advantage thereby."

The principle of estoppel, as above stated, does not militate against another principle which has found frequent application to the relation of landlord and tenant—one growing out of the doctrine of adverse possession. In *Willison v. Watkins*, 3 Pet. 43, it is declared to be the settled law that where a tenant openly and notoriously disclaims the title of his landlord, and

asserts title in himself, or in some stranger to whom he attorns, that then the possession of the tenant becomes adverse, and the landlord can maintain ejectment at any time before the expiration of the time prescribed by the statute of limitation. But there is a limitation of this statement expressed in the same decision; the tenant can in no case contest the right of his landlord to possession, or defend himself by any claim or title adverse to him during the time which the statute has to run. That the possession of the tenant may be adverse within the distinction just laid down, is recognized in *Peyton v. Stith*, 5 Pet. 491; *Walden v. Bodley*, 14 Id. 162; *Bowman v. Wathen*, 2 McLean, 399; *Merryman v. Bourne*, 9 Wall. 601. The statute commences to run as soon as the landlord has notice of the hostile attitude of the tenant: *Farrow v. Edmundson*, 4 B. Mon. 606.

Whether or not such a disclaimer shall be a disseisin of the landlord, rests in his election: *Currier v. Earl*, 13 Me. 216; *Stearns v. Godfrey*, 16 Id. 158; *Tillotson v. Doe*, 5 Ala. 507; 1 Wash. Real Prop., sec. 364. And it is said that this election turns upon the question of relief sought by the landlord. He may treat the tenant as a trespasser, and sue in ejectment under the authority of the above cases; or he may bring his action for the rent under the original contract between the parties. In *Sherman v. Champlain Transportation Co.*, 31 Vt. 162, 177, Chief Justice Redfield adverts to that relation of landlord and tenant, of which we have been speaking, and says, with his wonted clearness: "Till within a comparatively recent period, it was considered that a tenant could not, in any sense, repudiate his tenancy, even where it existed by parol merely, or from year to year; or that he could not do this without surrendering or abandoning the premises. But it is now settled otherwise in this state and in the United States supreme court. The tenant, by distinct notice to his landlord that he will no longer hold the premises under him, has been regarded here as committing an absolute disseisin, and after that as holding adverse to the landlord, and unless evicted before the term of the statute of limitations expires, he will, by such adverse possession, acquire title in his own right. In *Willison v. Watkins*, 3 Pet. 48, Mr. Justice Baldwin says: 'Had there been a formal lease for a term not then expired, the lessee forfeited it by his act of hostility; had it been a lease at will, from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespasser, as much so as if no relation had ever existed between them.' This case was professedly followed in two cases in this state: *Greeno v. Munson*, 9 Vt. 37; *Hall v. Dewey*, 10 Id. 593, and has been recognized in many others. It is undoubtedly a new doctrine, and adopted here from a regard to the difference in our land tenures, and in our civil and social relations and institutions in many respects, from those in England.

"But no case has been found where this principle of repudiating a tenancy without surrendering the possession, has been extended to an action for the rent, in such a manner as to excuse the tenant from paying rent or for use and occupation under the contract, by which the tenant made his entry for the full term of the occupation. And in *Hall v. Dewey*, Royce, J., expressly declares 'for other purposes than the statute of limitations, the original relation between the parties has its legal effect upon their respective rights.' It would certainly be a very wonderful departure from the usual principles of the law of contracts, if it were not so. If one party alone had the power, without any express provision to that effect, of terminating his liability under the contract, while he was still receiving the benefits secured to him by the contract, and for which he promised to make compensation so long as he en-

joyed them, it would be a construction which is certainly unjust, and equally at variance with the terms, and with the spirit of the contract."

The doctrine of some of the cases, that to enable the tenant to dispute or deny his landlord's title, he must first surrender possession, is said, by Tyler on Eject. 876, not to apply to an adverse holding by the tenant. That author there states that the only difference between the case of lessor and lessee, and the class of cases in which no privity exists between the parties, is in the degree of proof required to establish the adverse character of the possession, and says, as the lessee's title "was taken and held in subreversion to the title of the real owner, a clear, positive and continued disclaimer and disavowal of the title, and assertion of an adverse right, and to be brought home to the party, are indispensable before any foundation can be laid for the operation of the statute of limitations."

CRITTENDEN v. WILSON.

[8 COWEN, 165.]

A STATUTE AUTHORIZING THE BUILDING OF A DAM protects the person so authorized from indictment for a nuisance, without limiting their liability for damages resulting from the flowing the lands of others.

CUMULATIVE REMEDIES.—If a statute provide a remedy for a matter before actionable at common law, the common law remedy is not thereby divested.

CASE to recover damages for overflowing plaintiff's land by the erection of a dam across the Otselic river. Defendants pleaded an act of the legislature authorizing the erection of such a dam, and providing that in case any one was damaged thereby he might apply to the court of common pleas to appoint three appraisers to assess such damages, which the party erecting the dam should pay within sixty days. Demurrer to this plea and joinder.

J. A. Collier, in support of the demurrer.

J. A. Spencer, *contra*.

By Court, SUTHERLAND, J. It is contended that the legislature had no authority to authorize the erection of a dam, in such a manner as to overflow the land of third persons; or if they had, that they had no right to take from such persons the privilege of having their damages assessed by a jury, and direct them to be assessed by appraisers.

The Otselic river was declared a public highway by the act of April 12, 1813: 2 R. L. 286. No individual, therefore, had a right to obstruct it by dams, or other erections, without a grant from the legislature. The right of the legislature to

make such a grant is too clear to be disputed. The grantee, of course, takes it subject to the restriction, *sic utere tuo ut alienum non lædas*. The legislature, in this instance, have not assumed the right of authorizing the defendant to erect a dam which shall cause the lands of his neighbor to be overflowed. The act anticipates that such may be the consequence; and makes it an express condition of the grant that the defendant shall pay all damages which may result from it, and prescribe the mode in which they shall be ascertained. If there had been no express provision in the act for the payment of damages, the defendant would still have been liable to pay them; and the only effect of this provision is to enforce the duty of making compensation by additional sanctions, as the grant or license may be avoided, if the defendant should fail to pay the damages in the manner prescribed by the act. The effect of the grant is merely to authorize the defendant to erect a dam; as he might have done, if the stream had been his own, without grant. In such a case he would have been responsible in damages for all the injury occasioned by it to others. The dam could not be indicted as a public nuisance and abated. The only remedy for those injured would have been by action: *The People v. Platt and others*, 17 Johns. 195 [8 Am. Dec. 382].

Was it then the intention of the legislature, by making it a condition of the grant, that the defendant should pay the damages which might result to third persons from his dam, to be ascertained in the manner pointed out by the second section of the act, to deprive those who might sustain injury of their remedy by action? I think it is clear that such was not the intention of the legislature. Their object was to provide a summary remedy for those who might be injured by the dam, by which they might be remunerated more expeditiously, and with less expense, than by the ordinary course of law. They made it a condition of the grant that the grantee should, within sixty days, pay the damages which the appraisers should assess. They had a right to impose that condition; it was assented to by the defendant. He, therefore, voluntarily waived his right to a trial by jury. It was the condition upon which the privilege of erecting or continuing his dam was conferred upon him. But there is nothing in the act which, either in terms or by necessary implication, makes it compulsory upon those who may be injured to have their damages assessed under the act, or deprives them of their pre-existing common law remedy by action. The act is not couched in negative terms. The remedy

which it provides is cumulative merely, and not exclusive. "If a statute gives a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable by the common law, the party may sue at the common law as well as upon the statute; for this does not take away the common law remedy." 2 Inst. 200; Com. Dig., Action upon Statute, C.

It is unnecessary to consider whether the legislature had a constitutional right to deprive persons who might be injured by the defendant's dam of their remedy by action; as I am very clearly of the opinion that they have not undertaken to exercise such authority in this case.

The plaintiff is entitled to judgment upon the demurrer, with leave to the defendant to amend.

Judgment for the plaintiff.

Followed, as deciding that a statutory remedy is cumulative where there are no negative words depriving a party of the relief at common law in *Calkins v. Baldwin*, 4 Wend. 670; *Susquehanna T. R. Co. v. People*, 15 Id. 268; *Allen v. Ackley*, 4 How. 7; *Fort v. Burch*, 6 Barb. 76; *Waterford Turnpike v. People*, 9 Id. 173; *Selden v. Delaware Canal Co.*, 24 Id. 365; that an injury resulting from an unlawful act, is actionable, in *First Baptist Church v. Sch. and Troy R. R.*, 5 Barb. 86; S. C., 6 Id. 318; *Robinson v. N. Y. and Erie R. R. Co.*, 27 Id. 522; and in regard to the power of a state to regulate the use of navigable streams, in *Pennsylvania v. Wheeling Bridge Co.*, 18 How. (U. S.) 432; *Rundle v. Delaware Canal*, 1 Wall. jun. 292; and upon one's immunity from punishment criminally for an act done under a license from the government, in *First Baptist Church v. Sch. and Troy R. R.*, 6 Barb. 318; and *Clark v. Mayor of Syracuse*, 13 Id. 34.

MALCOLM v. ROGERS.

[5 COWEN, 188.]

CO-HEIRS are tenants in common; and, in bringing real actions, may by statute either join or may sue separately. They cannot be compelled to unite on one action.

JOINDER OF CO-TENANTS.—The general rule is that tenants in common can not join nor be joined in real or mixed actions, unless some entire or indivisible thing is to be recovered.

THE WORD "MAY" means must or shall only in cases where the public interest and rights are concerned, or where the public or third persons have a claim *de jure* that the power should be exercised; or where something is directed to be done for the sake of justice or the public good.

WRIT of right. The demandant claimed the one undivided tenth, as the heir of his father, and an undivided ninth of another undivided tenth as the heir of his brother, William A., deceased. After a special imparlance, defendants pleaded in

abatement that the co-heirs with the demandant were not joined in the action. Demurrer and joinder.

S. M. Hopkins, in support of the demurrer, contended that it was contrary to the settled policy of the common law to join tenants in common in a real action: *Litt.*, sec. 311; 1 *Inst.* 197, b; 2 *Bl. Com.* 194; *Com. Dig.*, Abatement, E. 10; *Jackson v. Brandt*, 1 *Cai.* 169.

J. Platt, contra. Our statute on this subject is that lands shall descend to sons as if they were all daughters. This makes the sons parceners. In real actions parceners must all join: *Com. Dig.*, Abatement, E. 8; *Steadman v. Bates*, 1 *Ld. Raym.* 64; *Osmer v. Sheafe*, 2 *Lutw.* 1210; *Co. Lit.* 164, a; 2 *Bl. Com.* 187, 188; *Runn. on Eject.* 223; *Jackson v. Sample*, 3 *Johns. Cas.* 235.

By Court, SUTHERLAND, J. The general rule is that tenants in common can not join or be joined in real or mixed actions, unless in the case where some entire or indivisible thing is to be recovered: *Co. Lit.* 197, b. Their freeholds are several, and they claim by several and distinct titles: *Litt.*, sec. 311; 2 *Bl. Com.* 194; *Com. Dig.*, tit. Abatement (E. 10), (F. 6). There is neither a privity of title, nor an union and entirety of interest, as between joint tenants, which render it necessary for the latter to unite, generally, in all real and mixed actions. It was formerly held that tenants in common could not join in making a lease; and that a recovery in ejectment could not be had upon their joint demise; but that a separate demise by each must be laid; else, as their estates and titles are different and independent of each other, it would be permitting the plaintiffs to try several and distinct titles in one issue, at the same time: *Adams on Eject.* 186; *Runn. on Eject.* 222. This rule was relaxed as to ejectment in *Jackson v. Brandt*, 2 *Cai.* 169.

By the 52 Hen. III, ch. 29, and the statute of this state for giving further remedy, and regulating the process and proceedings in assizes and other actions, 1 *R. L.* 79, sec. 2, it is provided "that if any person hath died, or shall die, leaving several persons, his or her lives, either in the same degree, or in different degrees, all such heirs shall or may recover in one writ or action, as heirs of the deceased person." This statute undoubtedly authorizes the bringing of a joint action by heirs who are tenants in common. But the question here is, whether it is imperative upon them to unite; and takes away all discretion upon the subject.

The statute was intended for the benefit and relief of heirs. Such is the scope and general character of its provisions; and the language used in this particular section, I am inclined to think, according to established principles of construction, leaves it discretionary with heirs to bring joint or several actions, according to their own views of their own interests.

In *The Newburgh Turnpike Company v. Miller*, 5 Johns. Ch. 112 [9 Am. Dec. 274], one point presented was, whether the plaintiffs were bound by an act of the legislature, passed in 1815, to remove their gate from the Walkill bridge. The words of the act were, "that it shall and may be lawful for the president, directors and company to remove the toll-gate," etc. The chancellor held that the statute was not imperative; but that it left it to the discretion of the company to remove their gate or not; and he considered the true rule of construction applicable to statutes in such cases to be, that the word may means must or shall, only in cases where the public interest and rights are concerned, and where the public or third persons have a claim *de jure*, that the power should be exercised.

So in *Rex v. Barlow*, 2 Salk. 609, it was said that where a statute directs the doing of a thing for the sake of justice or the public good, the word may is the same as the word shall. That was a case under the 14 Car. II, ch. 12, which gave power and authority to the church wardens, etc., to make an assessment to reimburse the constables. The statute was held to be imperative. Both the public and the constables had an interest in having the authority exercised. The statute of 23 Hen. VI., which says the sheriff may take bail, is construed the same as though it had said he shall, upon the principle already stated. The case of *Stamper v. Millar*, 3 Atk. 211, and *Backwell's case*, 1 Vern. 152, illustrate the same principle. In the latter case, the lord keeper declared, that though the words in the act of parliament, under which the application for a commission of bankruptcy was made, were, that the chancellor may grant it, yet that may was in effect must, and it has been so resolved by all the judges.

In the case now under consideration, the public has no direct or immediate interest in the question; nor have third persons a vested right; or, as Chancellor Kent expresses it, a claim *de jure* to call upon the plaintiff to exercise the authority given by the statute to sue jointly with his co-tenants; it is a power given for a benefit of the heirs, which they may exercise, or not, at their discretion. It is permissive merely, and not compulsory.

It was said upon the argument, that the English statute was the same as ours, and that under their statute coparceners and tenants in gavel-kind (who are coparceners by particular custom, instead of common law) may be compelled to join. Coparceners and tenants in gavel-kind might sue and be sued jointly at common law; and they are not at all affected by the statute. The properties of their estates are like those of joint tenants, not of tenants in common. They have a unity of interest, title and possession. All the parceners make but one heir, and have but one estate among them: 2 Bl. Com. 187. And although their estate is created in England in the same manner as a tenancy in common may be created under our laws, the properties, qualities, and incidents of the two estates are in no respect similar.

I am, therefore, of opinion that the demandant is entitled to judgment.

Judgment of *respondent ouster*.

THE MEANING OF THE WORD "MAY," in the construction of statutes, is settled in accordance with the principal case, and the language used by Chancellor Kent, in *Newburgh Turnpike v. Miller*, 9 Am. Dec. 279, to be as follows: The word "may," means "must" or "shall" only in cases where the public interests and rights are concerned, and where the public or third persons have a claim *de jure*, that such should be the construction given to the word. Approving this definition, and following *Malcolm v. Rogers* in this respect, are: *Martin v. Mayor of Brooklyn*, 1 Hill, 547; *Rogers v. Wing*, 5 How. 50; *N. Y. and Erie R. R. Co. v. Coburn*, 6 Id. 224; *Buffalo Plank Road Co. v. Commissioners*, 10 Id. 239; *Baldwin v. Mayor of N. Y.*, 2 Keyes, 411; *Fisher v. Hall*, 41 N. Y. 424; *Mason v. Pearson*, 9 How. (U. S.) 259; *Supervisors v. United States*, 4 Wall. 446. In the last citation the attention of the court was drawn to the words, that supervisors under township organizations "may, if deemed advisable," levy a special tax to pay the debts of the counties, etc. The question was, whether the supervisors could be compelled by mandamus to levy the tax, and it was determined that, under the act, they could. The conclusion, deduced from the authorities by Justice Swayne, is, "That where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases, it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.' The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category."

Instances of judicial interpretation of "may," are the following: When used in the act providing that mortgages may be acknowledged before a justice of the peace of the town or district where the mortgagor lives, "may" means "must:" *Ticknor v. McLelland*, 84 Ill. 471. So, also, in each of the succeeding citations: Where a duty is imposed upon a public officer: *Kass v. Footh*, 70 Id. 587; where a county "may issue warrants:" *State v. Commissioners of Buffalo*, 6 Neb. 454; when used in regard to the wife's suing alone concerning her separate property: *Rumsey v. Lake*, 55 How. Pr. 339; or in a statute providing that the probate court "may set apart" certain property for the deceased's family: *Walley's Estate*, 11 Nev. 260; *Ballentine's Estate*, 45 Cal. 696; or "may grant a continuance," for absence of an attorney as member of the general assembly: *St. Louis etc. R. R. Co. v. Teters*, 68 Ill. 144; in a statutory provision that if election returns be found incomplete, the board of canvassers "may despatch a messenger to the inspectors who made the returns, commanding them to complete the returns:" *State v. Board of State Canvassers*, 36 Wis. 498. Other decisions, in harmony with these cases, are: *Phelps v. Hawley*, 3 Lana. 160; *People v. Supervisors*, 51 N. Y. 401; *Steines v. Franklin County*, 48 Mo. 167; *State v. Saline County Court*, Id. 390; *Low v. Dunham*, 61 Me. 566; *Kelly v. Morse*, 3 Neb. 224; *People v. Commissioners*, 4 Id. 150; *Fowler v. Perkins*, 77 Ill. 271; *Commonwealth v. Haynes*, 107 Mass. 194.

The principal case is referred to in *Porter v. Bleiler*, 17 Barb. 156; and *Fisher v. Hall*, 41 N. Y. 424, on laying a demise from tenants in common, in a declaration in ejectment.

JACKSON EX DEM. BOGERT v. KING.

[5 COWEN, 237.]

REGISTERS OF BIRTHS, MARRIAGES AND BURIALS are competent evidence to prove pedigree, and when the original is of a public nature, and is admissible, an examined copy is equally admissible.

HEARSAY IN THE FAMILY and among relations, tradition and anything showing general reputation, may be admitted as evidence of pedigree.

IDENTITY OF PERSON is presumed from identity of name. Hence, if plaintiff shows a patent to A., and then establishes his descent from a person named, it need not prove that his ancestor and the patentee are the same person. The burden of showing that they were different persons rests on the defendant.

EJECTMENT. The opinion states the case. The cause was submitted on a motion to set aside a nonsuit ordered, and for a new trial.

J. L. Wendell, for the defendant.

G. W. Kirtland and S. G. Huntington, contra.

By Court, WOODWORTH, J. On the tenth day of September, 1708, a patent was granted to William Appel including the premises in question. The lessors of the plaintiff claim to be his heirs at law. At the trial, a sworn copy of certain entries

of baptisms and marriages in the records of the Reformed Protestant Dutch church, in the city of New York, was given in evidence to prove the pedigree of the lessors of the plaintiff, by which it appeared that on the twenty-sixth of May, 1695, one William Appel and his wife had a son baptized, by the name of Simon; that in 1719, Magdalena, and on the twenty-fourth of September, 1721, Gertruig, daughters of Simon Appel, were also baptized; and that on the twenty-fifth of August, 1743, Magdalena Appel was married to Abraham Pelts.

In almost all the books which treat on the subject of evidence, it is laid down that the register of births, marriages and burials is competent evidence; and wherever an original is of a public nature, and admissible in evidence, an examined copy will be equally admitted: Phil. 306, 320; Peak. 86; Bull. N. P. 247. This rule is necessary, as well for the security of the instrument as for the convenience of the public. In addition to this, the hearsay evidence of pedigree was competent and of itself sufficient. Baron Gilbert, in his Treatise on Evidence, 112, lays down the rule that hearsay is good evidence to prove who is the grandfather, when he married, what children he had; of which it is not reasonable to suppose the party has better evidence.

Bogert testified, that from conversation in his family and among his relations, from his infancy he always understood and had been informed that Magdalena Pelts was the daughter of one Simon Appel, and that Simon was the oldest son of one William Appel. Testimony as to pedigree is not to be tested by the ordinary rules of evidence; it forms an exception to the general rule. Hence it is, that anything that shows a general reputation, is admissible to establish it: Peak. 9. In *Goodright v. Moss*, Cowp. 591, Lord Mansfield held, that tradition is sufficient in point of pedigree. Lord Kenyon observed in the case of *The King v. The Inhabitants of Eriswell*, 3 T. R. 723: "I admit that declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to pedigrees; but evidence of what a mere stranger has said has ever been rejected in such cases." This doctrine was also sanctioned by this court in *Jackson v. Cooley*, 8 Johns. 128. In *Jackson v. Boneham*, 15 Johns. 226, a sworn copy of the records of the town of Stonington, which contained the date of the marriage of the parents of the lessors, and the time of the birth of their children, was admitted. In the opinion delivered, Thompson, C. J., says: "We do not perceive any objection to the admission of a sworn copy of the records as evidence of the family."

If, then, the evidence was properly received, the question to be decided is, whether William Appel, mentioned in the records of the church, is to be considered the person to whom the patent issued. In order to test this point, let us suppose that an ejectment had been commenced by William Appel in his lifetime, to recover the possession, and that he was the only lessor, would not the production of the patent be all that was necessary, in the first instance, to make out a title? I apprehend this question has been decided by our courts. In *Jackson v. Goes*, 13 Johns. 518 [7 Am. Dec. 399], letters patent to Peter Shultz, one of the lessors, were produced. The defendant proved that there was another person of the same name, who was too young during the revolutionary war to be a soldier; and that the lessor himself had not been a soldier. Upon that evidence it was held, that the defendant was entitled to judgment. By this statement it will be seen that no question was raised, whether the plaintiff was bound in the first place to prove his identity, as well as produce his patent. On the contrary, the right of the defendant to go into this evidence, was alone contested. The counsel for the defendant admitted, on the argument, that the lessor, on producing the patent, was *prima facie* entitled to recover. Spencer, J., observes: "In this action, whenever the plaintiff introduces a deed conveying the premises to a person of the name of his lessor, it is *prima facie* evidence that the lessor is the real grantee; the burden of disproving this, and repelling the presumption, is thrown on the defendant, and he may prove that the deed was granted to a different person of the same name." Thompson, C. J., observed that it was always open to a defendant in ejectment to show that the lessor was not the person intended by the patent, though he may bear the same name. The cases cited by the defendant's counsel from 1 Campbell, 196, and 4 Id. 34, seem to contravene this rule. In the first case, the action was to recover copyhold premises. It appeared that certain persons of the same name with the lessors had been admitted as tenants in fee. It was contended that evidence of the identity of the persons admitted ought to be given. Lord Ellenborough was of that opinion holding that there was not sufficient evidence of the admission of the lessors. In the latter case, the issue was *non est factum*; the witness produced was unacquainted with the defendant, and testified merely that a person executed the bond in the name of the defendant. This case does not apply, for the proof was manifestly defective, the witness not knowing that the person

who signed the bond was of the same name with the defendant. Dampier, J., observed, "that some evidence of indenture was indispensably necessary, and that even presuming that the person who executed was of the same name, he asked how did it appear that it was the defendant sued in the action? These were *nisi prius* cases, and however respectable, can not be regarded as a rule of decision here, in opposition to the practice recognized and acted upon in our own courts. The rule we have adopted is, that proof of identity may always be admitted when the fact is questioned, leaving to the defendant the right of showing that the plaintiff is not the person intended. As far as I am acquainted, the course of practice in this state has corresponded with this rule. I have never known a case, where a plaintiff having the name of a patentee or grantee, was required to go farther than the production of his deed or patent, unless the presumption of identity was first repelled by the defendant; nor where the production of a bond or note on trial was not holden *prima facie* sufficient against a defendant of the same name with the obligor or maker.

If, then, William Appel, described in the records, had been the lessor, his identity would be presumed, until disproved by the defendant; because there is no proof that there ever was another person of that name. The presumption cannot be affected, whether he stands before the court as a lessor, or the ancestor, under whom the lessors of the plaintiff claim. The presumption is not founded on the circumstance that an action happened to have been commenced; but on this, the patent is to William Appel; there was a person of that name, and no other or different person is proved to have existed. On the principles laid down, the conclusion is, that William Appel, described in the records, was the patentee.

The next question is, whether the evidence of pedigree, derived from the records of baptisms, was sufficient? They prove that William Appel had a son named Simon. That one Simon Appel had a daughter, Magdalena, baptized in 1719; and another daughter, Gertruig, baptized in 1721. That Simon Appel, mentioned in the extract of baptism in 1719, was the son of William, is, I think, to be presumed. The presumption is considerably fortified by the fact, that William appears to have been one of the sponsors. But it may be asked, what is the use of allowing the registers of births, marriages, and baptisms? If A. claims that B. is his ancestor, as grandfather; that such ancestor has been dead a century, and his son C. half a century;

it cannot be expected that living witnesses can be produced to prove the relationship of past generations. He may then resort to the register. What fact does that establish? It may appear that B. was married; that he had a son C. afterwards baptized; that C. afterwards had a son A. baptized; on the face of the register, it does not appear that A. was the son of C., or that C. was the son of B.; but it is the best evidence the nature of the case admits; and, because greater evils are apprehended from the rejection of such evidence, than its admission, the law has relaxed the general rules, and allowed the exception. But after all, the evidence would be unavailing, unless the law presumed that the persons named in the register, were the ancestors of the claimants; they all bearing the same names, and no evidence being adduced that there had ever been other persons of that name. From the search made by Bogert, the witness, in the book of records, for a great number of years, and nothing appearing to show that there was ever any other William or Simon Appel; from the fact that Simon had a daughter, Magdalena; and that a person of his name was married in 1743 to Abram Pelts; from the dates of the several baptisms and marriages being at such a distance of time from each other as to be consistent with the claim, I think it may be presumed, that these persons are descended of William Appel in a direct line. The testimony of Mrs. Van Deusen proves that Magdalena Pelts, the grandmother of one of the lessors, was the widow of Abram Pelts. She died in 1795. Her age is not stated. It is evident, however, she was far advanced in years, as her granddaughter was born in 1771. It is a reasonable presumption that she is the person whose marriage is certified to have taken place in 1743. From the preceding view, it follows that the judge erred in directing the nonsuit. The evidence produced by the plaintiff was *prima facie* sufficient to entitle him to recover.

Whether the presumption that William Appel, named in the certificate as the patentee, has been repelled by the evidence, on the part of the defendant, is a question of fact, proper for the consideration of the jury, under the direction of the court. The declarations of Mrs. Pelts, and the long acquiescence, were circumstances bearing on this question. It would be premature, in this court, to express an opinion now, as to the weight of testimony on this point, until a jury have passed on it. With respect to the possession it was not adverse at its commencement, nor at any subsequent period. Schaubert, the first possessor, declared he had no title. He sold to William King,

from whom the defendant received the possession. There is evidence that valuable improvements have been made; but none that the possessors claimed title.

I am of opinion that the nonsuit be set aside, and a new trial granted, with costs to abide the event.

Motion granted.

JACKSON EX DEM. HOOKER v. YOUNG.

[5 COWEN, 269.]

OMISSION TO FILE CERTIFICATE OF SALE under execution does not prejudice the purchaser. The statute is directory merely.

EJECTMENT. The lessor of the plaintiff claimed as assignee of the rights of a purchaser at a sheriff's sale of the premises in question. A nonsuit was moved, on the ground that it did not appear that a certificate of sale had been filed in the clerk's office according to the statute, and evidence was offered to prove that no such certificate of sale had been filed. The motion was denied and the evidence rejected; and a verdict was taken for the plaintiff subject to the opinion of the court.

Talcott, Attorney-general, for the plaintiff, referred to *Young v. Taylor*, 2 Binn. 227; *Jackson v. Rosevell*, 13 Johns. 97; *Jackson v. Vanderheyden*, 17 Id. 167 [8 Am. Dec. 378].

B. F. Butler, *contra*, urged that the statute was mandatory, and designed for the protection of creditors and for the information of the judgment-debtor, that he might redeem.

THE COURT, without hearing *Talcott* in reply, were clear that the statute was merely directory, and that the filing of a certificate was not a condition precedent to the giving of the deed and passing the title; and that the sheriff's omission should not prejudice the purchaser.

Judgment for the plaintiff.

As illustrative of what statutes are directory merely, *Jackson v. Young* is quoted in *People v. Allen*, 6 Wend. 487; *People v. Cook*, 14 Barb. 291; S. C., 8 N. Y. 89; *People v. Gardner*, 24 Id. 587; *People v. Supervisors*, 34 Id. 273; and in *Carpenter v. Willet*, 1 Keyes. 273.

The precise point decided in the principal case recurred in *Jackson v. Page*, 4 Wend. 590, and there made the basis of the decision in one respect. It appeared in evidence that the sheriff's deed, set up as a muniment of title, varied in some particular from the exemplification of the certificate on file. Evidence was introduced to show that the description in the deed was the correct description of the demanded premises, and the court held the vari-

ance immaterial. Referring to *Jackson v. Young*, they say that even the entire omission of the sheriff to file the certificate would not prejudice the purchaser, the statute being directory to the officer, and the certificate not necessary to the title of the purchaser. See, also, *Herman on Executions*, sec. 262; *Freeman on Executions*, sec. 312.

GLOBE INSURANCE CO. v. LANSING.

[5 COWEN, 380.]

BALANCE DUE AFTER FORECLOSURE OF A MORTGAGE in equity may be recovered at law by a suit on the bond.

DEBT on a bond. Plea, that the bond had been secured by a mortgage which had been foreclosed. Reply, that on the foreclosure sale the premises did not sell for amount sufficient to pay the face of the bond. Demurrer and joinder.

J. Lansing, in support of the demurrer, contended that the mortgagee was put to his election, either to sue at law on the bond, or to resort to the land in equity, but that he could not have both remedies: 1 Eq. Cas. Ab. 317; 2 Bro. C. C. 155; 6 Id. 107; 13 Ves. 198, 200; 2 Dickens, 551, 785; 8 Ves. 527.

J. L. Wendell, contra.

By Court, SAVAGE, C. J. The question presented is, whether a foreclosure and sale of the premises mortgaged as a collateral security, is an extinguishment of the debt due on the bond. It most clearly is not, any further than to the extent of the money produced by the sale of the mortgaged premises. In the case of *Dunkley v. Van Buren*, 3 Johns. Ch. 331, the late Chancellor Kent says: "It seems to be generally admitted in the books, that the mortgagee may proceed at law on his bond or covenant, at the same time that he is prosecuting on his mortgage in chancery; and that after foreclosure here, he may sue at law on his bond for the deficiency. He cites many of the cases cited at the bar; and those cases certainly support the doctrine.

In *Aylet v. Hill*, 2 Dick. 551, A. D. 1779, Lord Thurlow held that a mortgagee might proceed on his bond, notwithstanding he had obtained a decree of foreclosure; and denied an injunction to stay proceedings at law. Afterwards, in *Took v. —*, Id. 785, A. D. 1784, the same question came before him, and he decided, that so long as the mortgagee, after the foreclosure, remained in possession of the mortgaged premises, he must take the pledge as a satisfaction; but if he

sold the estate fairly, and it did not produce sufficient to pay the debt, he had a right to bring an action against the mortgagor, to recover the deficiency. Two years afterwards, he adhered to the same opinion in the case of *Tboke v. Hartley*, 2 Bro. C. C. 125. In the case of *Perry v. Barker*, 13 Ves. 204, 205, Lord Erskine decreed a perpetual injunction, where a mortgagee had taken possession under a foreclosure, though he had afterwards sold the estate at auction for less than the amount due. Yet he seems to admit, that had the decree been for a sale instead of a foreclosure, as practiced in Ireland, the proper course would be if the sale produced more than the debt, to decree the surplus to the mortgagor, and if less, then to allow the mortgagee to proceed on his bond for the difference.

The whole subject has been very fully and ably discussed by Mr. Justice Story, in the case of *Halch v. White*, 2 Gall. 152, where the principle established that the mortgagee is entitled to recover on the accompanying security, the deficiency of the mortgaged property to pay the debt, calculating its value at the time of the actual extinction of the equity of redemption. In that case there had been no actual sale, but the creditor had taken possession. In *Amory v. Fairbanks*, 3 Mass. 562, the plaintiff had execution for the balance due on the bond, deducting the value of the land after foreclosure, according to appraisement.

The plaintiffs are entitled to judgment, with leave to the defendant to withdraw his demurrer, and rejoin in twenty days, on payment of costs.

SUTHERLAND, J., being related to the defendant, gave no opinion.

Judgment for the plaintiffs.

HUNT v. PEAKE.

[5 COWEN, 475.]

INFANT'S CONTRACT TO MARRY an adult is voidable at the election of the infant, but not void. The infant may maintain an action for a breach of the contract, while the adult can not.

BREACH of promise of marriage. Joinder in demurrer to plea of infancy.

S. Starkweather, for the plaintiff. Infants may marry when they arrive at years of discretion, which is at the age of fourteen

in males; consequently, a promise to marry, made by defendant, who was of that age, ought to be binding.

L. Ford, contra, relied upon *Holt v. Ward*, 2 Str. 937; and 15 Vin., tit. Marriage, C., pl. 4.

By Court, SAVAGE, C. J. The general principle is against the liability of the infant, and I do not find that this case is an exception. In *Holt v. Ward*, 2 Str. 937, it was decided, after full argument and deliberation, that the contract to marry, by an infant, is not void, but voidable at the election of the infant, yet, as to the person of full age, contracting with the infant, it absolutely binds. Hence, an infant may maintain this action against an adult; but an infant defendant is not liable: Com. Dig., Infant, B. 6. The defendant is entitled to judgment.

Judgment for the defendant.

Followed in *Willard v. Stone*, 7 Cow. 23; and *Hamilton v. Loman*, 26 Barb. 816; and cited in *Crosier v. People*, 1 Park. 455.

CASES

IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS AND THE CORRECTION OF ERRORS.

OF

NEW YORK.

MACKIE v. CAIRNS.

[5 COWEN, 547.]

AN ASSIGNMENT IN TRUST FOR CREDITORS, providing that the assignees shall pay a certain sum per annum for the support of the assignor's family until he should be discharged from his debts, and not to exceed four years, is void as against any creditors who object thereto.

PARTIAL RESERVATION FOR THE BENEFIT OF THE ASSIGNOR, would not, at common law, annul the whole deed, though it might be avoided as constructively fraudulent. (*Per Sutherland, J.*)

A JUDGMENT GIVEN TO DELAY OR DEFRAUD creditors, is void as against them.

A JUDGMENT CONFESSED BY AN ASSIGNOR, to be used only in the event that an assignment made by him is not sustained, is itself void if the assignment was made to hinder, delay, or defraud creditors.

PARTIES TO A FRAUDULENT CONVEYANCE will not be permitted to deny its validity.

PREFERRING CREDITORS.—A debtor may prefer such creditors as he pleases, and may make an assignment for their benefit only.

A BOND VOID IN PART as against the positive provisions of a statute is wholly void.

AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS may be valid as between the parties, though void as against non-assenting creditors. If, subsequent to the assignment, the assignor confess judgment in favor of the assignees, there is no estate remaining in him on which the judgment can operate, for the parties can not be heard, to show that their own deed was fraudulent, and therefore void.

CROSS-APPEALS. The opinion states the case.

B. Sedgwick and S. Jones, for Cairns, Sedgwick and Lord.

T. J. Oakley, for Mackie, Milne and Lockhart.

SUTHERLAND, J. The chancellor, by his decree of the ninth of March, 1825, decided that the general assignment or conveyance from Cairns, Sedgwick and Lord, made on the eighteenth of April, 1823, was void in all its parts, in consequence of the trust or provision contained in it of two thousand dollars per annum for the benefit or support of the grantor. But he held the judgment confessed by Cairns to Sedgwick and Lord, on the first of August, 1823, to be valid; and that by reason of its priority to the judgment of Mackie and others against Cairns, Sedgwick and Lord, were entitled to the fund in controversy. From the first part of the decree, denying the validity of the assignment, Cairns, Sedgwick and Lord have appealed; and Mackie and others have appealed from that part of the decree which establishes the validity of the judgment. If either the assignment or the judgment is sustained, it will entitle Sedgwick and Lord to the fund in controversy.

I shall first consider the question as to the validity of the assignment. It is not attempted to be impeached on the ground of actual fraud. It is not pretended that the debts which it was the primary object of the assignment to secure were not justly due. Nor is the right of a debtor, in failing or insolvent circumstances, to prefer one class of creditors to another, called in question. But the assignment is said to be void within the statute of frauds, as being made with the purpose and intent, in judgment of law, to delay, hinder and defraud creditors, in consequence of the trust which it contains in favor of the grantor. That trust is as follows: "In trust, nevertheless, that the said Robert Sedgwick and Daniel Lord, jun., shall first pay to the said William Cairns, out of the proceeds of the assigned premises, from time to time, for the support of the said William Cairns and his family, after deducting all costs and reasonable charges of the said Robert Sedgwick and Daniel Lord, jun., in and about the premises, at and after the rate of two thousand dollars per annum, until the said William Cairns shall be discharged from his debts under some insolvent or bankrupt law, or otherwise; provided, however, that such period of payment to the said William Cairns shall not endure beyond the period of four years from the date hereof."

It is conceded that this is a trust which can not be enforced if objected to by the creditors of the assignor, or any of them, provided the funds assigned are inadequate to the payment of their debts; and the only question is, whether the whole assignment is rendered void by the illegal trust. An assignment

of property to a third person for the benefit of the assignor is, as against his creditors, equally inefficacious at common law, as it is under the statute. Standing alone, and unconnected with any other trust, it would be conclusive evidence of an actual fraudulent intent to put his property beyond the reach of his creditors. No other construction could be put upon the transaction; for, in the nature of things, it could originate in no other motive.

But a partial reservation for the benefit of the assignor, out of a general assignment for the benefit of his creditors, although it might be avoided as being constructively fraudulent at common law, clearly would not vitiate the other trust and annul the whole deed. But under the statute it is contended the result is different. In *Riggs v. Murray*, 2 Johns. Ch. 565, 580; 15 Johns. 571, S. C., on appeal, this question came before the late chancellor. That was the case of an assignment by an insolvent debtor of all his property upon certain specified trusts; reserving to the grantor the power to alter or revoke the trust and appointments at his pleasure. The assignment was made on the twenty-third of March, 1798. On the twenty-fourth the grantors by deed declared certain other trusts, reserving, as in the first deed, the power to alter or revoke the appointments within a year. On the twenty-first of March, 1799, the grantors by deed revoked and annulled the appointments and trusts of the deed of the twenty-fourth of March, 1798; and declared certain other trusts, but still reserving the power to alter and revoke. On the twenty-second of March certain other trusts were declared, and the power to alter and revoke was still reserved. On the thirty-first of May, 1800, the grantors made a final and absolute declaration of the trusts, without any reservation of the power to revoke or make further appointments; and by this deed the trustees were directed, out of the proceeds of the property assigned, to pay: 1. All the expenses incurred; 2. A sum not exceeding two thousand dollars per annum for each of the grantors, four in number, towards their support from the twenty-eighth of March, 1798, until they should be respectively discharged from their debts, or until one year after they should be discharged by law.

On the fifteenth of June, 1801, a commission of bankruptcy was issued against Robert Murray; in July, 1801, an assignment of his property was made to the complainants in the suit, who were the assignees under the commission; and in 1802, they filed their bill against the trustees to annul and set aside the

assignment. The bill alleged that the assignment was fraudulent and made to delay, hinder, and defraud the creditors of the grantors. The fraud was denied in the answers of the assignees, and a reference was made to a master by consent to ascertain the amount received by J. B. Murray, one of the assignees, and what sum he was entitled to under the deed of trust. Upon the report of the master, which found a large balance to be due to J. B. Murray, and upon the equity reserved, without any proofs having been taken before the master except as to the accounts, the cause came to a hearing before the chancellor. And he held the assignment void on account of the power of revocation which it reserved to the grantors. He considered all the deeds as part of the same transaction, and constituting, in fact, but one act or deed; and although the last deed of the thirty-first of May, 1800, did not reserve the right to revoke or alter the trusts in terms, still, as it referred to the deed of 1798, which did contain that power, he held that they must be considered and taken in connection with each other. He remarks: "It may therefore be assumed as a clear and undisputed fact, that whether these deeds be viewed separately or taken in connection as parts of one whole, and forming one entire act, they were made subject to the future disposition and power of the grantors, as well in respect to the debts due to Clark and Murray (the trustees), as in respect to the debts of the other creditors alluded to in those deeds. This leads us," the chancellor continues, "to the consideration of the important question arising out of this case, whether such an assignment by an insolvent debtor to a few select creditors, with such a power of revocation attached to it, can be deemed valid in law. The necessary inference seems to be, that it was to 'delay, hinder, or defraud creditors.' That such powers of revocation are fatal to the instrument, and poison it throughout, appears to have been well established by authority."

He then comes to the consideration of that part of the case, which has an immediate bearing upon the one now under consideration. He says: "A reservation of a part of the interest to himself, as in *Turback v. Marbury*, 2 Vern. 510, and in *Estwick v. Caillaud*, 5 T. R. 420, does not destroy the provision in respect to the residue; though if the part unreserved be deficient, the creditors might perhaps apply to a court of equity for the residue. But if the power enables the grantor to defeat the whole provision, all the cases concur in declaring it null and void."

Here is a clear and explicit declaration of the opinion of that learned judge, that a reservation of a part of the trust fund, for the benefit of the assignor, will not vitiate the other provisions in the deed. This was not an *obiter dictum*. It related to a point fairly presented in the cause, and on which the chancellor could not well have avoided the expression of an opinion.

Upon an appeal brought to this court, the prevailing opinion was delivered by Chief Justice Thompson. And in relation to the reservation for the maintenance and support of the grantors, his opinion was in perfect coincidence with that of Chancellor Kent. He says: "The grantors having reserved to their own use, for their maintenance and support, a part of the property covered by this deed, forms no objection to the appropriation of the residue. This is fully established by the cases I have already referred to, and is indeed admitted by the chancellor in the case before us, though in case of a deficiency to satisfy the creditors they might apply to a court of equity for the appropriation of the property so reserved towards the payment of their demands." Chancellor Sanford considers this opinion of Chief Justice Thompson as founded on the peculiar circumstances and equities of the case before him, and not as intended to sanction and establish the general proposition which in terms it seems to maintain. He says: "I can not understand the decision of the court of errors, to legalize, by one universal rule, these reservations by an insolvent debtor for his own use. But I understand by their decision, that in special cases of peculiar equity the whole assignment shall not be subverted by this illegal trust." I can not but think, with great deference and respect, that the chancellor has misapprehended the scope and bearing of the opinion of the chief justice. He was for reversing the decree below, principally on the ground that the deed of the thirty-first of May, 1800, was absolute and irrevocable, and did not, like the previous deeds, contain a reservation to the grantors of a power to revoke and alter the trusts; and that that deed, in connection with the original assignment of the twenty-third of March, 1798, was sufficient to protect and establish the appellant's preference, and that the intermediate deeds or declarations of trust might be laid out of view.

That as the title of the respondents, as assignees of the bankrupt, did not accrue until June, 1801, they had no right to impeach the trust deeds, on grounds which had been removed before they had any right or interest in the question. That the power of revocation did not render the deeds absolutely void

and incapable of confirmation, as between the parties, before the rights of third persons intervened. Whatever, therefore, might have been the original character of the transaction, he held that every legal objection to it was removed, and the title of the appellants rendered perfect before the respondents had any interest in the funds in controversy. That Robert Murray himself, after the deed of the thirty-first of May, had no control over the trust fund, and that his assignees under the commission could take nothing which the bankrupt had not a right to assign to them. He remarks: "There can be no doubt but at that time (May, 1800) an original assignment might have been legally made, giving to John B. Murray all the claim now set up; if so, there could be no good reason against his then taking a ratification or confirmation of any prior defective assignment." He then proceeds: "Where the creditor is pursuing his debtor with a judgment and execution, or in any other manner to enforce payment of his demand, an assignment of the debtor's property, containing a power of revocation, may very well be considered as made to 'delay, hinder, or defraud creditors,' according to the language of the statute of frauds; but I do not see how it could in any sense be said to delay or hinder a creditor who was taking no measures to enforce payment of his demand as in the case now before us. For anything that appears, all the creditors of Robert Murray & Co. were satisfied with the assignment, and the provision there made for the payment of the debts."

The chief justice is here considering the effect of the power of revocation in the deeds prior to that of May, 1800, and he admits that that provision would clearly have rendered them void against any creditor, who, during their existence, might have attempted to enforce payment of his demand. As against such a creditor, he concedes, they must have been considered as made with the intent to delay, hinder and defraud him; but his argument is, the respondents are not such creditors; they did not become creditors until after the power of revocation in those deeds had been abrogated by the deed of 1800, and they ought not now to be permitted to impeach the assignment on a ground which had ceased to exist before their title accrued, especially, when, for aught that appears, all the creditors of Robert Murray & Co. were satisfied with the assignments (containing the power of revocation) and the provision there made for the payment of their debts. The parties in interest during the continuance of those assignments, never complained, and the represen-

tatives of those parties (the respondents the assignees in bankruptcy) shall not now avail themselves of the objection.

The whole argument relates exclusively to the power of revocation, and the deeds in which it was contained, that is, the deeds prior to that of May, 1800. Now, none of those deeds contained the trust for the benefit of the grantors. That was contained in the deed of May 31, 1800, which did not reserve the power of revocation. The special circumstances, therefore, on which the chief justice dwelt, and which the chancellor supposes influenced the judgment of the court, and distinguishes it from the case now before us, I humbly apprehend, were urged exclusively in relation to the power of revocation, and had no reference to or bearing upon the reservation of a portion of the fund for the benefit of the grantors. The chief justice could not have intended to say, that for anything that appeared in that case, the creditors of Robert Murray & Co. were satisfied with the assignment of the thirty-first of May, 1800. He could not have intended to discriminate between the respondents who were the representatives of the creditors, and the creditors themselves, and to intimate that the case would have been varied, if the assignment had then been impeached by a creditor, instead of the assignees. The assignees succeeded to all the right of all the creditors, and their dissatisfaction with the assignment was conclusive evidence, in judgment at law, that each individual creditor was dissatisfied: *Vid.* Rob. on Fraud, Conv. 491, note (k). Nor could he have intended to say that none but judgment-creditors, at the time of the assignment, could impeach it. I repeat, therefore, that, in my humble apprehension, this court did not decide the case of *Murray v. Riggs*, upon any special circumstances, so far as the trust in favor of the grantors was concerned; but that they proceeded upon the broad principle, that such a trust in an assignment for the benefit of creditors, does not *per se* vitiate and destroy the whole deed. Nor do I perceive how the judgment in that case can be sustained on any other ground.

Such, too, was the view the supreme court took of that case in *Austin v. Bell*, 20 Johns. 447. The assignment in that case was impeached on the ground that it contained a reservation of a certain sum for the maintenance and support of the grantor and his family, and also because it provided that if any of the creditors named in the assignment should not, within a limited time, assent to the assignment, then the trustees should pay to the grantors the proportion of the fund which would have belonged

to such creditors. The assignment was held to be void on the latter ground. But in relation to the first objection, Chief Justice Spencer, in delivering the opinion of this court, remarks: "In the case of *Murray v. Riggs*, one of the appointments and reservations in the trust deed of the thirty-first of May, 1800, was, that the trustees should pay out of the proceeds of the property assigned, towards the support of the grantors, a sum not exceeding two thousand dollars a year for each of the grantors. As to this reservation, the chancellor was of opinion, on the authority of *Estwick v. Caillaud*, 5 T. R. 420, that it did not destroy the provisions in respect to the residue; and he intimates an opinion that if the part not reserved was deficient, the creditors might apply to a court of equity for the residue. In this part of the chancellor's opinion," he observes, "Chief Justice Thompson, (who delivered the opinion of the court of errors), concurred. This then," he continues, "puts an end to the objection made to this assignment, as to a reservation out of the trust property of a support, for a limited time, for one of the assignors." The supreme court, therefore, considered the position upon this subject, laid down by Chancellor Kent, and concurred in by this court, as a general proposition, and not founded upon the particular circumstances of that case; and as settling the question that a reservation out of the trust property for the support of the grantor, for a limited time, did not, *per se*, vitiate and destroy the residue of the assignment, coinciding fully, for the reasons which I have assigned, in this view of the case in *Murray v. Riggs*, I cannot consider that question as now open for discussion.

But if it were open, I think the decision on this point, in *Murray v. Riggs*, fully supported by the case of *Estwick v. Caillaud*, 5 T. R. 420. In that case Lord Abingdon assigned a certain mansion-house, with the park, pleasure grounds and personal chattels belonging to it, to one Estwick, for ninety-nine years, in trust to receive the rents and profits and pay one half of them to the grantor during his life; and the other moiety to certain creditors enumerated in a schedule attached to the deed. One Townsend, not being a favored creditor, obtained a judgment against Lord Abingdon, and levied an execution on some of the property assigned; for which the assignee brought an action for trespass. Upon the trial it was left to the jury to determine the actual intent of the transaction, and they found it to be fair, and gave a verdict for the plaintiff. Upon a motion for a new trial, it was contended that the deed was void on the face of it

under the statute of frauds, 13 Eliz., on account of the reservation in favor of the grantor. But the court were unanimously of opinion that that did not destroy the deed. It was contended in *Austin v. Bell*, and also in this case, that *Estwick v. Caillaud*, was decided on the ground that it was a partial, and not a general assignment of the property of the grantor; and that for aught that appeared, enough was retained by him to pay the creditor who was then prosecuting. Spencer, J., in *Austin v. Bell*, also remarks, "that the case of *Estwick v. Caillaud* was decided on the ground that Lord Abingdon had not assigned all his property, but that he reserved enough to satisfy the particular creditor who sought to set aside the assignment." Now, I humbly apprehend that it does not appear that that was the ground of the decision in any sense that affects the question of the reservation for the benefit of the grantor. The fact that it was a partial assignment is inferred only from the circumstance that it did not appear on the face of the deed to be a general one; and this circumstance is alluded to by the judges, not intending to show that the deed was not fraudulent under the statutes of Elizabeth, but that it did not come within the operation of the spirit of the bankrupt laws, as being a general assignment for the benefit of favored creditors. Lord Kenyon says: "There was nothing fraudulent either in the construction of the deed, or in the manner of carrying it into execution. It was neither illegal nor immoral to prefer one set of creditors to another. This case differs in many respects from the preference given by bankrupts. But it was never held, even in the case of a trader, that he could not give a preference in some respects, provided he did not exhaust his whole estate, or approach so near to a disposition of the whole as that the exception was merely colorable. But as it does not appear that this was a conveyance of the whole of Lord Abingdon's property, the case is delivered from the objection which asserts that the deed is fraudulent because it was only intended as a provision for some of the creditors to the exclusion of the rest." The objection was, that the assignment was bad, because it was not for the benefit of all the creditors. Lord Kenyon answers it by saying it was a partial, not a general assignment, having no reference or allusion whatever to the reservation in favor of the grantor.

Mr. Justice Ashurst says: "There is nothing illegal on the face of the deed; for a debtor may prefer one set of creditors to another, except in certain cases of the bankrupt laws. Where the bankrupt laws do not interfere, a debtor may give a prefer-

ence to particular creditors. There appears," he continues, "no badge of fraud in any part of the transaction. All the legal property was transferred to the plaintiff for legal purposes; and though a part of the profit was reserved for Lord Abingdon himself, that alone will not avoid the legal estate in the trustee for the benefit of the scheduled creditors. And when those creditors are satisfied, the other creditors may apply to a court of equity for the residue."

Mr. Justice Buller says: "If we are to decide on the face of the deed itself, that is a question of fraud in point of law. Now, taking the deed by itself, not accompanied with the circumstance that there were other creditors of Lord Abingdon, there is no pretense for the objection. Nor does the objection occur here, that this was a conveyance of the whole of Lord Abingdon's property; for it is not so stated in the deed, and the contrary appears from the evidence;" alluding evidently to the objection which had been answered by Lord Kenyon, that it was an assignment for the benefit of favored creditors; and, therefore, fraudulent within the spirit of the bankrupt laws. The fact that Lord Abingdon had, previously to the assignment, offered Townsend the materials of another building in satisfaction of his demand, could not have affected the question of legal fraud appearing on the face of the deed, whatever influence it might have had on the question of actual intent: *Vide*, also, 2 Vern. 510; 4 East, 14; 1 Ves. jun. 160.

Nor am I dissatisfied with the decision in *Murray v. Riggs*, upon principle. The question is not, whether a man can put his property beyond the reach of his creditors, by conveying it in trust for his own use; it is conceded that he can not; but it is, whether the reservation of a moderate portion of his property for the maintenance of his family, for a limited time, in a general assignment for the benefit of his creditors, shall, in all cases, be conclusive evidence in judgment of law of an intent to delay, hinder and defraud his creditors, within the meaning of the statute of frauds, so as to vitiate and destroy the whole conveyance. I fully agree with the chancellor, and with the decision in *Hyslop v. Clarke*, 14 Johns. 458, that if such a provision is to be considered conclusive evidence that the conveyances were made with an intent to delay and hinder creditors, it must avoid and destroy the whole assignment; because the statute has declared that all conveyances made with such intent shall be absolutely void, and of none effect. It is for that very reason, believing that cases may exist in which such a provision

would be neither unjust nor improper, that I would hold it voidable only upon application to a court of equity, and not absolutely void within the statute.

The principle in relation to this point appears to me not to be stated with perfect accuracy by the learned judge who delivered the opinion of the court in *Hyslop v. Clarke*. He says (14 Johns. 465): "It appears to be an established rule that where a bond is void in part, as against the positive provisions of the statute, the whole bond is void." Now, I apprehend, that if a bond contains provisions, which are declared illegal, or void by statute, and other provisions which are legal, the whole bond will not be void, unless the statute expressly provides that those illegal provisions shall render the whole bond void. Suppose the statute of frauds had expressly declared that any provision for the grantor, in an assignment for the benefit of creditors, should be considered fraudulent and void; would an assignment unexceptionable in every other respect, but containing such a provision, be void throughout? I apprehend not. The statute having merely declared that such a provision should be void, without having declared what its effect should be upon the residue of the assignment, that effect would have been left to be ascertained and determined by the rules of the common law. But if the statute had declared, not only that any such provision should be considered fraudulent, but also that any conveyance containing any such provision should be absolutely void, then the whole deed undoubtedly would be void; not because it was void in part as against the positive provisions of a statute, but because the statute had declared, in terms, that being void in part, it should be void throughout. The provision for the benefit of the assignor in this case may be set aside without affecting the other provisions of the deed, and without conflicting with any of the cases which have been cited.

I am, therefore, of opinion that so much of the decree of the chancellor as adjudges the assignment from Cairns to Sedgwick and Lord to be void throughout, by reason of the trust or provision for the benefit of Cairns, should be reversed. Holding the assignment to be good, there is no ground on which the judgment can be impeached as fraudulent. It is a cumulative security only, for a justifiable object. But admitting the assignment to be fraudulent, I should still hold the judgment to be valid, for the reasons assigned by the chancellor. The written declaration of trusts accompanying the judgment, and which is

testified by the oath of one of the assignees, shows that the judgment was confessed for the purpose of securing payment to certain creditors, and for that purpose only. There was no trust for the benefit of the insolvent. The judgment was not intended (nor could it possibly have the effect) to protect the annuity to Cairns. Sedgwick swears expressly, that all the trusts were contained in the written declaration accompanying the judgment. But it is unnecessary to enlarge on this point. I think, as to judgment, the decree of the chancellor should be affirmed.

I think both parties are entitled to the costs of their answers, as defendants to Mr. Hone's bill. They were subsequent incumbrancers, and were necessarily made parties. They both answered and disclaimed as against Mr. Hone's prior lien, and assented to the sale of the premises, reserving their respective claims to the surplus. There is nothing to except this case from the general rule, that, on a bill to foreclose a mortgage where subsequent mortgagees or judgment-creditors, who are made defendants, answer and disclaim, they are entitled to their costs, to be paid out of the fund: 3 Johns. Ch. 61; 13 Ves. 370; 7 Id. 583; 2 Mad.J. 554, 559.

My opinion being in favor of the validity of the assignments and judgment, which it was the object of all the proceedings, subsequent to the decree of the twelfth of January, 1824, to impeach, I think Cairns, Sedgwick and Lord, are entitled to their costs upon all those proceedings before the judge of the first circuit, except the proceedings upon the petition of Mackie, Milne and Lockhart, for the examination of Cairns, which the circuit judge disposed of by an interlocutory decree of the twenty-sixth of May, 1824; and upon the petition of Cairns, Sedgwick and Lord, for a modification of the decree of the twelfth of January, 1824, which were also disposed of by an interlocutory decree of the twenty-seventh of May, 1824. The costs of those motions having been disposed of by the circuit judge, I am of opinion his decision in this respect should not be disturbed. They are also entitled to all their costs of the proceedings upon appeal in the court of chancery, to be paid by Mackie, Milne and Lockhart.

WOODWORTH, J., BRAYTON and REDFIELD, Senators, concurred.

COLDEN, Senator. Will the law permit an insolvent debtor to assign his property, so that he may enjoy, against the will of his creditors, such part as he may choose to reserve for his own use?

However simple and disembarrassed this question may at first appear, it is one of those so elaborately argued before us, and which we have now to decide. Mr. Cairns, being insolvent, assigned by several instruments all his property to Messrs. Sedgwick and Lord, in trust that they should allow him out of the proceeds, or out of the rents and profits, two thousand dollars a year till he should be discharged from his debts; but the allowance was not to extend beyond four years; and upon the further trust that the residue should be distributed among certain of his creditors.

Here, then, is a conveyance by which an insolvent debtor reserves to himself out of his property such revenue as he sees fit, for such time as he thinks will suit his convenience; and when his creditors who are not among those he has chosen to favor, and who are dissatisfied, obtain an execution against his estate, they find in their way a conveyance which not only hinders them from levying their debt, but secures the property, in part at least, to their debtor.

If there be such a thing as natural equity; if we may ever appeal to those perceptions of right and wrong which are independent of all learning, it seems to me that we may do so on this occasion, and can not hesitate to decide that such a disposition of property is invalid. We are not left, however, to the mere dictates of natural justice. The legislature has thought proper to record its precepts; and we have them in the statute, 1 R. L. 75, which enacts that every conveyance which is devised or contrived with an intent to delay, hinder or defraud creditors, shall be clearly and utterly void, frustrate, and of none effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary, notwithstanding. That the conveyance or assignment in question has delayed and hindered creditors, the testimony before us establishes. If to put property in such a situation that an insolvent may enjoy it in defiance of those to whom he is indebted, is to defraud them, the assignments in question will, if they stand, have that effect. Generally, and unless the contrary appears, we must infer that the consequences which naturally flow from the acts of a person were intended by him. This will lead us to the conclusion that the assignments not only did hinder and defraud creditors, but were intended so to do.

It is unnecessary, however, to resort to this reasoning to arrive at this conclusion. It is avowed that the assignment was intended to prevent certain of his creditors from touching the

property, so that the insolvent might enjoy that benefit from it, which he had thought proper to reserve for himself; and that the residue might be distributed among those he chose to favor. One would think, therefore, that this assignment was not only unconscientious, but directly against the statute.

But we are referred from legislative enactments to judicial decisions; and told that we must receive these as the law, however they may be in collision with the letter of the statute. And yet it would seem that the prescriptions of the judicial code must be contradictory, or liable to very different interpretations; for in this case many authorities have been cited by the counsel on each side to maintain their respective and directly opposite propositions.

We are bound to pay great respect to the opinions of other tribunals. We owe obedience to the former judgments of this court. If this court has heretofore determined that an assignment like those now under consideration, made under the same circumstances, may be maintained, we ought to consider this as the established law, however we might be disposed to decide otherwise if the question was now agitated here for the first time. An inferior tribunal is at liberty to change its decisions as the opinions of its members may alter; but if this court of the last resort were to exercise the same liberty, there would be no security for property. The members of this court are in part annually changed; and if those who compose it at any time should feel themselves unrestrained by the determinations of their predecessors, the rights of things and persons might vary as often as the court was in session; and we should be in that condition which one of our oldest writers says, marks a miserable people, "where the laws are vague and uncertain." If the law as settled by this court be inconvenient or wrong, it must be for the legislature to change it. They can do it without disturbing dispositions of property which may have been made in accordance with the judgments of this court; whereas, a judgment here, in opposition to former decisions of this tribunal, unsettles all that may have been done pursuant to what the community had a right to consider as the established law.

With these views I shall for a moment advert to some of the cases which have been cited in support of the assignments. One class of them establish that a conveyance by an insolvent in favor of some creditors, to the exclusion of others, is not against the statute. But these cases are very different from one where an assignment reserves part of the estate to the

assignor. In the former case, though one creditor may be hindered, and even deprived of any share of his debtor's property, yet it can not be said to hinder or delay creditors when the whole property is immediately put out of the hands of the assignor, and the whole of it goes to creditors. In these two cases there is all the difference that there is between an assignment the object of which is to prefer some creditors, and an assignment the object of which, as to the part reserved, is not only to hinder but forever to defeat all creditors.

Lord Abingdon's case, *Estwick v. Caillaud*, 5 T. R. 420; S. C., 2 Anst. 381, is one much relied upon; and I confess I find much difficulty in distinguishing that case, in principle, from the one we are now considering. It appears to me that the report of that case develops one of those contrivances by which the nobility of England put their estates at nurse, so that they may recruit without being harassed by importunate creditors. How far the policy of protecting the wealth of the aristocracy of England may have influenced the jury and court in favor of Lord Abingdon, I will not pretend to say. "The effect of that decision was to allow Lord Abingdon to enjoy his mansion-house, park and pleasure-grounds," to permit him to make presents of his deer, and run his horses at Newmarket, while his creditor, who had built his house, and whose debt had been due more than twenty years, was obliged to look on with his execution in his hands. I will presume that this English case may be distinguished from that now before us by the circumstances which the chancellor has noticed; but if it be not, I find nothing in this decision of the court of king's bench that commands my respect; and I owe no obedience to it, because it was decided long subsequently to the revolution.

It is not so with the case of *Murray v. Riggs*, 15 Johns. 571; that being a judgment of this court, according to the principles which I have professed, I hold myself bound by the decision. Whenever another case occurs, similar in all its circumstances, I will decide as this court has heretofore decided. But I think the court in that case carried its indulgence to the insolvent debtor to the very utmost length. I will not consent to go one step further in the same course. I think we can not do so without trampling on the statute.

When, therefore, I am to determine whether an assignment made by partners, of their partnership property only, which reserves out of the property assigned a sum for their support, be void, when the creditors have acquiesced in the assignment for

several years, and till the assignees have distributed the money arising from the assets among the creditors; where no creditor has been actually impeded in the pursuit of his remedy, and where at last the creditors themselves do not sue, but the assignment is questioned by assignees under a commission of bankruptcy, I shall give an opinion in favor of such an assignment. But I shall not attempt to give any other reason for my opinion than that in the case of *Murray v. Riggs* this court has decided that such an assignment, under such circumstances, is good.

In the case of *Austin v. Bell*, 20 Johns. 442, Chief Justice Spencer, after having applied his great and discriminating mind to the consideration of the case of *Murray v. Riggs*, notwithstanding that case, says: "I am bound to say that a deed which does not fairly devote the property of a person overwhelmed with debt, to the payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall prescribe, is, in law, fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder or defraud creditors of their just and legal actions." The assignments of Mr. Cairns have all these characters of the assignment of the Messrs. Secors, which induced the supreme court unanimously to pronounce that assignment void. Mr. Cairns was overwhelmed with debt. He reserved an annuity of two thousand dollars a year for four years, unless within that time his creditors would assent to his discharge.

The case before us presents none of the features which were peculiar to the case of *Murray v. Riggs*. And I think we can not sanction this assignment of Mr. Cairns without so far repealing the statute for the prevention of frauds; or give effect to any part of the assignments, without overruling the decisions of the supreme court in the cases of *Hyslop v. Clarke*, 14 Johns. 458, and *Austin v. Bell*, 20 Id. 442.

If we decide that the assignments are invalid, we dispose of a large part of this case. The judgment confessed by Mr. Cairns remains to be considered. The language of the statute in relation to judgments and executions is the same as in relation to grants or conveyances; it is declared that they shall be clearly and utterly void, and of no effect if they be entered with intent to hinder or defraud creditors of their actions or just debts, or to hinder or let the due course and execution of law and justice; though a judgment be fraudulent, this will never appear on the face of it. All judgments are entered ac-

cording to certain forms; and if these be duly observed, they are valid unless they may be set aside by a court on grounds which do not appear on the record. Whether a judgment be void or not, under the statute, depends on the intent with which it was entered. The intent must be gathered from the acts and declarations of the parties in relation to it. If a judgment be intended to secure a person a part of his property, so that he may enjoy it against the will of any one of his creditors, and if it will have that effect, it is void.

Messrs. Sedgwick and Lord, on the day the judgment was entered, executed a declaration that they held the judgment in trust for securing to the honorary and confidential creditors of Mr. Cairns, mentioned in a schedule to the declaration annexed, the payment of their debts, as in the schedule specified. Among these creditors, Mackie, Milne and Lockhart are not named. There cannot be a doubt, that if the judgment and declarations were an independent transaction between the parties, the judgment would be valid. It would be a legal means of giving a preference to creditors which the law allows.

I entirely concur with the chancellor in the opinion he has expressed, that where a security is taken which is defective or questionable, and I will add fraudulent, a party may take a new security that may be exempt from all objection. But then he must abandon the objectionable or fraudulent security. He cannot hold the good security, and yet avail himself of that which is vicious. Much less can he make the new security a means of sustaining that which was illegal. The declaration of trust can not be conclusive as to the intent of the parties. For as to the intent, as in relation to other instruments, we must look to acts and expressions.

Mr. Sedgwick, in his answer to the seventh interrogatory, says, that "the instruments and judgment are now held by defendant and Daniel Lord, junior, upon the trust declared as above stated, in relation to the same respectively." And in a further answer to the same interrogatory, he says, he "knows of no act or thing by which the trusts in the assignment of the twenty-fifth of March, or either of them, have been annulled or abrogated, impaired or modified, otherwise than by the operation of the other instruments of writing above mentioned." That is, by the subsequent assignments and the declaration as to the judgment, all of which, except the last, refer to and confirm the trusts expressed in the first assignment of the twenty-fifth of March.

In a petition presented to the circuit court by Messrs. Cairns, Sedgwick and Lord, the fourth of May, 1824, they say they "claim as assignees under certain trust deeds or assignments, and under a certain judgment confessed to them in trust for the benefit of the creditors of Cairns, the said deeds and last mentioned judgments being all prior to the said judgment of Mackie, Milne and Lockhart."

In answer to the fourth interrogatory before Master Bolton, Mr. Sedgwick answers that he and Mr. Lord "have at all times, since the eighteenth of April, 1823, insisted upon the validity of the several assignments and conveyances." This, as well as their answer to the bill, is sufficient to show that Messrs. Sedgwick and Lord never gave up the assignments, and there is abundant evidence that, in accordance with their opinion, they continued to act under them long after the judgment was entered.

They sold the houses to Henry D. Sedgwick and Develin, on the fifteenth of January, 1824, and they say they then considered themselves as holding under the assignments. They had paid to Mr. Cairns, as they say, on account of the provision for his maintenance contained in the assignments, between two and three thousand dollars. A great part of this was paid after the judgment was entered, so that Mr. Cairns received to his own use this large amount of his property, while Mackie, Milne and Lockhart could receive nothing, on account of their debt of three thousand dollars, which sum they had paid to Mr. Cairns for a bill of exchange only four days before he failed, and before he made his first assignment. Add to this, that when the sheriff, who held the *fiery facias* issued on this judgment, applied to Mr. Sedgwick to show if there was any property of Mr. Cairns on which the execution might be levied, Mr. Sedgwick told him he knew nothing about it, by which the witness understood he had no directions to give concerning it, and when the sheriff asked him if the property had not been assigned, he answered it had. There seems no kind of question, then, that after the judgment was entered, Messrs. Sedgwick and Lord continued not only to insist on the validity of the assignments, but to act under them. That they availed themselves of the judgment to maintain the assignments, appears from the testimony which I shall now notice.

In his answer to the sixth interrogatory, before Master Bolton, Mr. Sedgwick states that the assignees always maintained that if the assignments and conveyances were not good and valid in law, then the judgment was valid and binding. In an-

other part of his testimony, he says the judgment was to be resorted to, only in case the assignments were not valid. And again, the *feri facias*, he says, was intended to cover all property assigned, provided the same was subject thereto, notwithstanding the assignments.

Mr. Sedgwick repeatedly states that his intentions were fair and honorable; and that neither the assignments nor judgments were intended by him to have what he esteemed an undue or fraudulent operation. To this no one will more readily assent than myself. But we can not consider declarations of this nature from parties interested, made in exculpation of their conduct. We must interpret acts by their consequences; and must presume persons intended to produce the effects which naturally flow from their acts. We can not doubt that the assignees, Messrs. Sedgwick and Lord, intended to continue, and would have continued, to pay Mr. Cairns his annuity, and to have executed their trust according to the assignments, if Mackie, Milne and Lockhart had not instituted a suit to avoid these assignments. In what situation then do the assignees place the creditors by means of the judgment? They hold to the creditors in effect this language: "We shall go on and execute the trust according to the assignments, whether they be good or bad. If you institute a suit and set the assignments aside, you can get nothing by it; because, then, we shall claim all the property under the judgment; and however this may benefit the favored creditors, mentioned in the schedule, yet it can be of no advantage to you." Indeed, this is exactly the operation of the judgment, if this court confirm the decree of the chancellor as to the assignments. These will be declared fraudulent and void; and yet, if the judgment is permitted to stand, Mackie, Milne and Lockhart will have gained nothing by their suit; but on the contrary, will have borne uselessly all this litigation. Mr. Cairns may yet receive his two thousand dollars a year, if the schedule creditors do not object; and the assignees will be perfectly secure that no other dissatisfied creditors, who may not be among those Mr. Cairns has thought proper to favor, will ever question their conduct. The judgment protects them, however illegal the assignments may be under which, since the judgment was entered, they have acted, and may continue to act.

Let us suppose, for a moment, that the declaration, executed when the judgment was entered, instead of being as it is, should have expressed trusts similar to those contained in the

assignments; that is to say, that Mr. Cairns should receive out of his property two thousand dollars a year; provided that, if any creditor should be discontented, and should succeed in establishing, in a court of chancery, that this provision was fraudulent and void, then the judgment should stand good for the benefit of certain favored creditors. I can not think that we should hesitate, for a moment, to pronounce a judgment connected with such a declaration void. It can make no difference that the trusts, as to the judgment now in question, are not on the same paper with the declaration made when the judgment was entered.

I can not concur in opinion with the chancellor, that the judgment is a new security, unconnected with the assignments, and exempt from all the objections which apply to them. I think the facts as they stand before the court, so far from not admitting, as the chancellor supposes, a presumption that the judgment was given and taken upon the trusts expressed in the antecedent assignments, prove incontestably that the judgment was so given and taken. The evidence that the assignees continued to act under the assignments; that they paid Mr. Cairns' money according to the assignments, after they had obtained the judgment, and intended to continue to act under the assignments until they should be declared invalid, is as positive proof, it appears to me, as the nature of the case admits, that the judgment was confessed by Mr. Cairns with an intent that it should be used, if it could be so used, to support the assignments, and deter dissatisfied creditors from questioning them, and for no other purpose.

I, therefore, think that this judgment was devised and contrived to delay creditors of their lawful actions and demands, to the hindrance of the due course of the execution of law and justice, and that so it is against the statute, and must be held utterly void. There remains to be disposed of the two interlocutory decrees of the circuit court; one of the twenty-sixth of May, 1824, ordering Mackie, Milne and Lockhart, to pay the cost of an unsuccessful application, which they have made to have Mr. Cairns examined before the master; and the other of the twenty-seventh of the same month, ordering the same parties to pay the costs of a successful application, which Messrs. Cairns, Sedgwick and Lord had made to have the decree of the circuit court amended.

These decrees, in my opinion, were both erroneous. The only reason that we can find for the first decree is suggested by

Mr. Sedgwick in an affidavit which he made and read to oppose the application; which is, that the whole business having been conducted under his advice and agency, he was better acquainted with all the facts than Mr. Cairns; and he, Mr. Sedgwick, having been examined, it was unnecessary to examine Mr. Cairns.

But why were Mackie, Milne and Lockhart obliged to rest on the examination of one party? Had they not the same right to have Mr. Cairns examined that they had to have the testimony of Mr. Sedgwick? Possibly Mr. Cairns and Mr. Sedgwick might not have agreed in their testimony. Possibly Mr. Cairns might not have given the same answers as to the intent of the assignments and judgment that Mr. Sedgwick had given. I can imagine no possible reason why this application should not have been granted. I think, therefore, that the circuit court, not only erred in compelling Mackie, Milne and Lockhart to pay the costs of that application, but in refusing to let Mr. Cairns be examined.

On the twenty-seventh of May, the circuit court ordered that its own decree of the twelfth of January preceding, so far as it ordered costs out of the fund to Mackie, Milne and Lockhart, having been unadvisedly entered without the authority of the court, should be expunged. Now, if this decree had been wrongfully entered by Mackie, Milne and Lockhart, then they might have been justly chargeable with the costs of the application to set the decree right. But Messrs. Cairns, Sedgwick and Lord state in their petition to have the decree altered, that they were informed by the solicitor of Mackie, Milne & Co., that the order that they should have costs was inserted by the solicitor of Philip Hone, the original complainant in the suit. There is nothing to contradict this information. Messrs. Sedgwick and Lord do not allege that it was incorrect; nor is there anything to show that Mackie, Milne & Co. had ever been requested to consent to an alteration of the order. I can not conceive, therefore, why Mackie, Milne and Lockhart should be charged with the costs of correcting this mistake. In my opinion, the orders of the circuit court should not have been affirmed by the chancellor.

My opinion is that the decree of the chancellor, so far as it respects the assignment, be affirmed. That so far as respects the judgment and the two interlocutory orders of the circuit court, it be reversed, and the judgment declared void. That the money which Mackie, Milne and Lockhart have paid under the two last-mentioned decrees, be refunded to them by Cairns,

Sedgwick and Lord; and that they pay to Mackie, Milne and Lockhart the costs of those applications. That so much of the money arising from the sale of the premises mortgaged to Philip Hone as remains (after satisfying the mortgages to which the same premises were liable, and the costs of the mortgagees, or of those representing them,) be paid to Mackie, Milne and Lockhart, on account of their judgment; and that Cairns, Sedgwick and Lord pay to Mackie, Milne and Lockhart their cost incurred in the circuit court, the court of chancery, and this court.

Since this cause was argued we have been furnished with a manuscript, purporting to be the report of a case decided in the supreme court of the state of Louisiana, sitting in the eastern District, by which it appears that one of the assignments of Mr. Cairns now before this court, was by the judgment of the court of Louisiana declared to be valid. The judges of Louisiana say that the decree of our chancellor, avoiding the assignment, "is most clearly correct, according to the laws of this state, on the subject of insolvencies." But the court of Louisiana consider that the *lex loci contractus* ought to govern. They therefore feel themselves constrained to ascertain what is our law; and come to the conclusion that it is settled in favor of the assignments by the case of *Murray v. Riggs*, notwithstanding our chancellor's opinion that the case could not sustain the assignments of Mr. Cairns. I have already noticed the circumstances which, in my opinion, render the case of *Murray v. Riggs* different from that in which we are now rendering judgment. I am entirely disposed to pay the court of the state of Louisiana all the respect that may be due to it, but when I am searching for an exposition of the decisions of our own tribunals, I think it safer to take as guides our own chancellor and judges, than to follow those who, as they say themselves, probably have no practical, and may be supposed to have little even theoretical knowledge of our laws. In the cases of *Hyslop v. Clarke*, and of *Austin v. Bell*, our supreme court has given a different interpretation to the case of *Murray v. Riggs*, from that which has been adopted in Louisiana. I have already assigned my reason for believing that the judgment of the supreme court in these cases was correct; and I find nothing in the report of the case from Louisiana to change my opinion.

CLARK, LIEFFERTS, LYNDE, THORN and WILKESON, Senators, concurred.

SAVAGE, C. J. (after stating the facts): In my judgment, all depends on the validity of the assignments, particularly the assignment of April 18, 1823. It purports to be a conveyance of the very property out of which the fund in question arises. If it did not convey the property, then, clearly, Cairns was not the owner on the first of August, 1823, when Sedgwick and Lord's judgment was docketed. They were themselves the owners; and a judgment in their favor could not be a lien on their own property. If the assignment was fraudulent and void as to creditors, still it was valid as between the parties, and their rights under it will be the same as if it were valid against all the world. It does not lie in the mouths of the parties to the fraudulent conveyance to say it is fraudulent: 7 Johns. 161.

I lay the judgment entirely out of the question. Had the plaintiffs intended to rely upon it, they should have released to the defendant the property on which it was to become a lien. It is admitted that the judgment was intended to come in aid of the assignment; and hence the assignees have subsequently been executing the trusts of the twenty-fifth of March, and eighteenth of April, 1823, particularly the first, which relates to the provision for the insolvent.

The question then recurs, were those assignments valid; or, if not, were they void in part, or *in toto*? Suppose the debtor, finding himself in failing circumstances, had conveyed the whole of his property to assignees in trust for himself, could there be a question on the subject? An insolvent will not be permitted thus to defraud his creditors and mock the insulted majesty of the laws. When a debtor fails, either from misfortune or folly, or from dishonest motives, his property, in moral justice, belongs to his creditors. He is permitted to prefer in payment such creditors as he pleases. This is giving him power enough, but when he appropriates the property to his own use, the act becomes fraudulent. Nor does it lie in his power to prescribe terms to his creditors. The law is open to them. They have a right to pursue their debtor in the mode pointed out by law, and any act which obstructs them in their pursuit is against law, and of course void; unless such act appropriates the property to the payment of debts.

Our statute of frauds, 1 R. L. 75, sec. 1, declares all conveyances of goods, to the use of the grantor void and of none effect. The second section declares all conveyances of lands or goods, made with intent to delay, hinder, or defraud creditors, utterly

void, as against such creditors. This statute, as has often been said, is only in affirmance of the common law.

The trusts created by the assignments are good in part and bad in part; and the rule in such cases has been settled in the case of *Hyslop v. Clarke*, 14 Johns. 465. The court say: "It appears to be an established rule, that where a bond is void in part as against the positive provisions of a statute, the whole bond is void." This doctrine is recognized in *Austin v. Bell*, 20 Johns. 449, and is not controverted, in terms, in any subsequent case. How far it is impaired, if at all, by *Murray v. Riggs*, 15 Johns. 571, I will next consider.

When that case was discussed by the late chancellor, he remarked, speaking of *Tarbuck v. Marbury*, 2 Vern. 510, that a reservation of part of the interest to himself, as in that case, and in the one of *Estwick v. Caillaud*, 5 T. R. 420, did not destroy the provision in respect to the residue; though if the part unreserved was deficient, the creditors might, perhaps, apply to a court of equity for the residue. But if the power enabled the grantor to defeat the whole provision, all the cases concurred in declaring it null and void. When that case came into this court, Chief Justice Thompson, who delivered the opinion of the court, says: "The grantors having reserved to their own use, for their maintenance and support, a part of the property covered by this deed, forms no objection to the appropriation of the residue. This is fully established by the cases I have already referred to; and is indeed admitted by the chancellor in the case before us; though, in case of a deficiency to satisfy the creditors, they might apply to a court of equity for the appropriation of the property so reserved, towards the payment of their demands. As the learned judge had cited no case immediately to this point, I have examined all the cases cited by him. In none of them does this feature exist, except the two cases cited by the chancellor from 2 Vern. 510, and 5 T. R. 424.

The first of these cases was as follows: William Marbury, in 1672, made a conveyance to Brook and others, of his estate, to the use of himself for life, with power to mortgage such part of the estate as he pleased, remainder to the trustees and their heirs, in trust to sell and pay all his debts. Mortgages were executed on all the estate. Debts were incurred by him, by judgments, statutes, bonds, and simple contracts. The trustees having the legal estate, the creditors could not recover at law. The question in chancery was, whether the creditors, by judgment and statute, should be preferred to those by bond and

simple contract; or whether they should take their average with the others. The court held the deed of trust fraudulent and void; and assigned two reasons: 1. Because Marbury continued in possession, and kept the deed in his custody, and the creditors had no notice of it; 2. That having reserved a power to mortgage, he might have charged it to the full value; which amounted, in effect, to a power of revocation, and therefore was fraudulent as against creditors by judgment and statute. If this case proves anything, as to the point now under consideration, it is this: That a conveyance to trustees to the use of the grantor is void; and the creditors have the same remedies as if the conveyance had never been made. But it by no means shows that a reservation in a deed, to the use of a grantor, is valid as against creditors. It does not appear, in this case, that Marbury was indebted to any great amount. Above all, it does not appear that he was insolvent when he executed the conveyance.

The only case which is left to support this doctrine is that of *Estwick v. Caillaud*, 5 T. R. 420. In that case it appeared that the defendant had levied on certain property, in possession of the plaintiff, by virtue of an execution against Lord Abingdon, at the suit of one Townsend. Lord Abingdon being indebted, but not insolvent (for that is not stated, nor is it inferable), made a conveyance to the plaintiff of part of his property, in trust to receive the profits, and pay one half to Lord Abingdon, and the other half to his scheduled creditors. On the trial it was left to the jury to decide whether the deed was made to defraud Lord Abingdon's creditors. It appeared that Townsend's debt was one of long standing; that his father, the original creditor, had never demanded the debt; the present Townsend had not sued, nor threatened to sue, when the deed was given, and some time before it was done, Lord Abingdon had offered to pay Townsend, in the materials of a house. The debt arose originally by Townsend's father building a house for Lord Abingdon. The jury found for the plaintiff, being of opinion that there was no intention of defrauding creditors. The court refused a new trial, saying that Lord Abingdon had a right to prefer one set of creditors. Ashurst, J., says: "Though a part of the profits was reserved for Lord Abingdon himself, that, alone, will not avoid the legal estate in the trustees, for the benefit of the scheduled creditors; and when those creditors are satisfied, the other creditors may apply to a court of equity for the residue." Buller, J., said, taking the deed by itself, it

did not appear to be fraudulent. It was not stated to be a conveyance of all the property of Lord Abingdon; and the contrary appeared from the evidence, as Lord Abingdon had offered payment out of other funds, which showed that he had no intention of defrauding Townsend. He also adds: "As Lord Abingdon assigned over more than would probably be sufficient to satisfy those creditors, it seems to me that it was a fair proposal on his part, that a certain portion of the rents and profits should be reserved for his own benefit in the mean time." This, however, had reference to the fairness of the transaction as between Lord Abingdon and the scheduled creditors.

The plaintiff, in that case, being told that his remedy was in equity, filed his bill in the exchequer, and obtained an injunction; and on a motion to continue it, that court considered the question of fraud as *res judicata*, having been decided in the king's bench. And as to reaching property in the hands of a trustee, or stock in the funds, Chief Baron McDonald said: "Courts of equity have never granted an injunction in a similar case." 2 Anst. 381, S. C.

If this, therefore, is to be considered a parallel case, and as controlling the present, it proves that both the chancellor and Chief Justice Thompson were mistaken, in saying that a court of equity would direct the property reserved to be appropriated to the payment of the creditors not contained in the schedule. But, in truth, it is not analogous. Lord Abingdon was not an insolvent debtor. Townsend was not a creditor pursuing his legal remedies when the deed was executed, nor for several years afterwards. Before the deed was given, Lord Abingdon offered payment. He left part of his property unconveyed; and as may be inferred from the remarks of Mr. Justice Buller, sufficient to pay the debt in question. Such is the case from which the late chancellor and Chief Justice Thompson drew the doctrine that "the grantors having reserved to their own use, for their maintenance and support, a part of the property covered by the deed, forms no objection to the appropriation of the residue." It should be stated that this was not considered the principal point in the case they were deciding.

However unsupported this proposition may be, and I think I have shown that it has no adjudged case to support it, yet it seems to be distinctly asserted and assented to by this court. The chancellor thinks the case in which it was asserted not in point for the one we are considering. It is true that Chief Justice Thompson considers all the creditors of the insolvents

as satisfied with the arrangements made by the assignments. He regards this as important. And if the facts are so to be understood, there can be no objection to it; nor would it be an authority for this case. Here the creditors, Mackie, Milne and Lockhart, have never assented to the assignment. They have lost no time in endeavoring to recover their just dues by legal process. Nor are laches of any kind imputable to them.

But if the case of *Murray v. Riggs*, is to be considered as an authority in this case (and Chief Justice Spencer so considered it in the case of *Austin v. Bell*, though he evidently denied its correctness) if it must be met, then I would ask, in the very appropriate and forcible language of the present chancellor: "Is it law that every insolvent debtor in this state, may, by assigning all his property in trust, secure to himself an allowance of two thousand dollars a year, or any other sum from his own property?" And I will add, is it not directly against the statute? Our laws have specified what property of a debtor the creditor shall not take from him. Any attempt of the debtor to set apart a fund for his own support must be fraudulent and void. If he may take to his own use two thousand dollars a year, why not five thousand dollars? And if for four years, why not for ten, or even twenty, as in the case of *Murray v. Riggs*. To state such a proposition is a sufficient refutation of it. It offends the moral sense; it shocks the conscience, and produces an exclamation. It is directly against the statute, and cannot stand before it.

But even should this assignment be considered a valid one, it is conceded that the amount appropriated to the grantor's use, may be taken to satisfy creditors by an application to a court of equity for that purpose. What, in substance, is the present application but a contest for this very appropriation? The validity of this reservation does not arise collaterally; it is directly called in question. It is almost the only ground of contention. If, therefore, it is admitted that these creditors will be entitled to the reservation in question, by filing a bill expressly for that purpose; then I would ask why turn them out of court, when it is admitted, if they come in a different attitude, they will be entitled to what they ask? For whose benefit are we to direct all this circuitry of action? Surely not for the benefit of the creditors; nor yet for the benefit of the insolvent.

On the whole, I am of opinion that the assignments are fraudulent and void, as against creditors pursuing their legal

remedies; but valid as between the parties. That the judgment constitutes no lien on the property out of which the fund in question was raised; the equity of redemption having been previously conveyed by a deed which was valid as between Cairns and his assignees. And, therefore, that Mackie, Milne and Lockhart, are entitled to the fund in question, or so much thereof as will pay their judgment. Certain deductions, however, should be made from it. In my judgment, both these parties litigant should receive their costs for appearing as defendants at the suit of Philip Hone. But after the contest for this fund became a suit between them, costs should be awarded to the prevailing party.

I am of opinion, therefore, that so much of the decree of his honor, the chancellor, as awards the fund in court to Sedgwick and Lord should be reversed, with costs. And so much as affirms the decree of the circuit judge of the twenty-seventh of May, altering the decree of the twelfth of January, 1824, should also be reversed, with costs; and the residue affirmed.

BURT, CRAMER, CRAW, GARDINER, GREENLY, HAIGHT, LAKE, MALLORY, McINTYRE, MORGAN, NELSON, WOOSTER and WRIGHT, Senators, concurred.

For affirmance: BOWMAN, BURROWS, DUDLEY, EARLL, ELLSWORTH, and KETES, Senators.

A majority of the court concurring in the result of the opinions delivered by Savage, Chief Justice, and Colden, Senator, the following decree was thereupon entered:

Decree. A majority of this court being of opinion that the assignment or conveyance made by the said William Cairns to the said Robert Sedgwick and Daniel Lord, jun., is void, by reason of the trust or provision contained therein for the benefit of the said William Cairns, it is adjudged and decreed, that so much of the aforesaid decree of the court of chancery as relates to the said assignment or conveyance, be in all things affirmed.

And a majority of the court being also of opinion that the judgment confessed by the said William Cairns to the said Robert Sedgwick and Daniel Lord, jun., is also void, it is adjudged and decreed, that so much of the aforesaid decree of the court of chancery, as affirms the validity of the said judgment, be reversed.

And it is also adjudged and decreed, that the surplus moneys arising from the sale of the mortgaged premises mentioned in the pleadings in this cause, and now remaining in the court of

equity for the first circuit of this state, be applied as follows: First, to the payment of the amount due on the judgment in favor of the said William Mackie, Andrew Milne, and Andrew Lockhart; next, to the payment of their costs as hereinafter decreed; and that the balance, if any, do remain in the said circuit court, subject to the order thereof.

And it is also adjudged and decreed, that the costs of the said William Mackie, Andrew Milne and Andrew Lockhart, in the circuit court and in the court of chancery, including their costs on the interlocutory decree of the circuit court, made on the twenty-sixth day of May, 1824, and on the interlocutory decree of the same court, made on the twenty-seventh day of that month, be paid to them out of the aforesaid surplus moneys, provided the said surplus moneys shall be sufficient for that purpose, after paying to the said William Mackie, Andrew Milne and Andrew Lockhart, the amount of their judgment as above directed; and in case the said surplus moneys shall not be sufficient, it is hereby adjudged and decreed, that so much of the said costs as may have accrued since the making of the decretal order, made by the circuit court for the sale of the said mortgaged premises, be paid to the said William Mackie, Andrew Milne and Andrew Lockhart, by the said William Cairns, Robert Sedgwick and Daniel Lord, jun.

And it is also adjudged and decreed, that the said William Cairns, Robert Sedgwick and Daniel Lord, jun., do refund to the said William Mackie, Andrew Milne and Andrew Lockhart, the amount of the costs paid by them to the said Cairns, Sedgwick and Lord, pursuant to the aforesaid interlocutory decrees of the twenty-sixth and twenty-seventh of May, 1824.

And it is also adjudged and decreed, that so much of the aforesaid decree of the court of chancery, relating to the application of the surplus moneys arising from the sale of the mortgaged premises, mentioned in the pleadings in this cause, and to the costs of this suit, as is inconsistent with the provisions of this decree, be reversed, and that this cause be remitted to the court of chancery, to the end that this decree may be carried into effect.

And it is also adjudged and decreed, that the costs of the said William Mackie, Andrew Milne and Andrew Lockhart, upon the proceedings in this court, be paid to them out of the aforesaid surplus moneys, in case the same shall be sufficient for that purpose, after payment of the judgment and costs hereinbefore mentioned; and if not, then by the said William Cairns, Robert Sedgwick, and Daniel Lord, jun.

THAT A GENERAL ASSIGNMENT TO TRUSTEES for the benefit of creditors, which does not comprise all of the assignor's property, or wherein is reserved some future allowance for the assignor is void, is settled in New York in the following adjudications, each of which mentions with approval the principal case: *Wilder v. Winne*, 6 Cow. 288; S. C., 4 Wend. 112; *Seward v. Jackson*, 8 Cow. 433; *Hastings v. Belknap*, 1 Denio, 197; *Beck v. Burdett*, 1 Paige, 310; *Van Nest v. Yoe*, 1 Sandf. 10; *Berry v. Riley*, 2 Barb. 309; *Burdick v. Post*, 12 Id. 178; *McLean v. Button*, 19 Id. 454; *Bishop v. Halsey*, 13 How. 158; *Curtis v. Leavitt*, 15 N. Y. 116; *Elias v. Farley*, 3 Keyes, 401. See note on residuary interest in assignor avoiding assignment: *Wilkes v. Ferris*, 4 Am. Dec. 364, 367; *Freeman on Executions*, sec. 146; see, also, *Naylor v. Foedick*, 4 Am. Dec. 203, note.

Mackie v. Cairns, is cited in *Grover v. Wakeman*, 11 Wend. 194; *Waterbury v. Sturtevant*, 18 Id. 363; *Wilson v. Forsyth*, 24 Barb. 126; and in many of the above decisions, as demonstrating that a debtor may prefer a creditor; in *Pepper v. Haight*, 20 Barb. 437; *Fiedler v. Day*, 2 Sandf. 597; *O'Neil v. Salmon*, 25 How. 253; *De Beeriski v. Page*, 47 Barb. 175; S. C., 36 N. Y. 539; *Mittnacht v. Kelly*, 5 Abb. N. S. 445; S. C., 3 Keyes, 401, on the point that an assignment void in part for fraud, is void *in toto*; and in *D'Ivernois v. Leavitt*, 23 Barb. 81, in regard to the invalidity of a judgment confessed to secure an assignment held to be fraudulent.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

DOE EX DEM. TATEM v. PAINE.

[4 HAWES, 64.]

TERMINI, QUESTIONS OF.—What are the *termini* or boundaries in a grant or deed, is a question of law for the court; where those boundaries or *termini* are, is a question of fact for the jury.

NATURAL OBJECTS, when found, prevail over courses and distances.

COURSES AND DISTANCES may be used as guides by which to find natural objects, or to determine, in cases of doubt, which of two or more natural objects is the one intended. They explain latent ambiguities, but do not control natural boundaries.

EJECTMENT. The lessors claimed a certain island marked X in a diagram produced in the cause, by virtue of a grant from the state, dated March 18, 1823. The defendants were in possession, and derived title under a patent granted to John and Thomas Williams and Joseph Ferebee, dated December 2, 1807, described and bounded as follows: "A tract of land, etc., known by the name of Betsy's Marsh or island, beginning at Herring's gut, the beginning place of John Humphries' entry, running north 79, east six chains and thirty links," etc., giving the courses inclosing an entry made by John Humphreys, Esq. One of the calls for a course was "south 80 west, forty chains, along the north channel," and according to this call, the distance, and the course and distance terminated at different points. Following one of these *termini*, according to the subsequent courses and distances, the lines would include nearly one half the island of X, but the lines would be in the navigable waters of North Channel.

Defendants offered a copy of John Humphries' entry, to

enable the jury to discover the proper boundaries of the patent; and contended that the whole of island X was, at the date of their patent, included in what was known as Betsy's Marsh; that the sluices had been enlarged by storms between that piece of land and the body of the marsh; and that there never was, nor is, a channel between the island and the mainland. To prove this, John and Thomas Williams were called, whose testimony was objected to on the ground of interest, they having conveyed by deed of bargain and sale, with warranty to Sawyer, one of the defendants. Sawyer executed a release, and the witnesses were allowed to testify. The plaintiff called Samuel Ferebee, the surveyor who laid out the land under defendant's patent, but he could not say whether the small islands were included in the survey or not, nor did his field-book of the survey correspond with the calls of the patent.

The court informed the jury that the principal question was whether the land covered by the grant of the plaintiff's lessor was included within the bounds of the patent under which the defendants claimed. If it was, then they should find for the defendants, as theirs was the oldest patent. In ascertaining the true boundary, they would be guided by those calls in the patent which appeared to them most certainly to make out the intention of the parties; that there was no dispute until they came to the letter E in the plat whence the call was north 80 west, 40 chains, along the north channel, and therefore the natural boundary must be followed. And if there were no other calls, course and distance should guide the jury, and would carry them through and include part of the island of X., entitling the plaintiff to the remainder. It was no objection that the line ran across navigable waters, in locating the true boundary of land. The jury were directed to consider any other calls that defined the boundaries with greater certainty. The court charged that Ferebee's field-notes were not admissible evidence, save for the purpose of refreshing his memory.

Verdict for the defendants. Plaintiff's motion for a new trial being overruled, he appealed.

L. Martin, for the defendants.

By Court, HENDERSON, J. What are the termini or boundaries of a grant or deed is a matter of law. Where those boundaries or termini are is a matter of fact. It is the province of the court to declare the first, that of the jury to ascertain the second. Where natural objects are called for as the termini,

and the course and distance and marked lines are also given, the natural objects are the termini, and the course and distance and marked lines can only be resorted to by the jury to ascertain the natural objects; they act as pointers or guides to the natural object. When the natural boundary is unique, or has properties peculiar to itself, these pointers or guides can have but little effect; in fact, I believe, none. Where there is more than one natural object in the neighborhood answering the description, that is having common qualities, then those pointers or guides may be reverted to, to ascertain where the object called for is, or which is the object designated. They do not then contradict or controvert natural boundary; they explain a latent ambiguity created by there being more than one object which answers the description. It is completely within Lord Bacon's illustration of the rule as to a latent ambiguity.

The judge was, therefore, right in his general observations, that natural boundaries must prevail over artificial; but this is rather a rule of law than of fact; it governs, properly speaking, him and not the jury. It was a misapplication of the rule to inform the jury, that after arriving at the letter H., they were at liberty to pass through the island X on the way to the great shoal, including part thereof within the grant, and excluding part. The rule must work both ways. If the grant includes the whole of Betsy's Marsh or island, without regard to courses and distances, because called for by it, nothing but what is Betsy's marsh or island can be included in it by courses and distances. The island X was part of Betsy's Marsh or island, or it was not. If the first, the whole of it was included in the grant; if it was not, none of it could be brought within it by artificial calls; but this error produced no effect, the jury included the whole of the island X. A new trial ought not to be granted, therefore, for this error. The survey of Humphries' entry made by Messrs. Williams, was admissible to show the extent of Betsy's Marsh or island, for the entry and grant had the same calls. It was also proper to show that they, the Messrs. Williams, for they were witnesses on the trial, were uniform in their opinions on the subject, and, I understand, from the judge's charge taken together, that it was introduced for the first purpose, for throughout the jury are told that natural boundaries will prevail over artificial, by which I understand the judge to say, that in law the grant includes the marsh or island. I am inclined to think that the difficulties in this case have arisen from not attending to the description in the grant, which is marsh or island.

If the island X could not pass under description of island, an island being land separated by water from other lands, and there being a sluice between the island X and what is called the main island, at all times having water in it, although fordable by cattle and hogs, yet, it might pass under the description of marsh, for a marsh may include many islands, particularly when separated only by narrow and shallow sluices, and in the neighborhood of and surrounded by broad and deep waters, where such small separations would scarcely attract attention.

It is not the duty or perhaps right of this court to value the evidence; but I think it would not be improper in this case to say that after arriving at the letter H, if the line passed through the sluice, that is along it, there was no possible inducement after getting through it to go to the great shoal at the head of the channel, a terminus called for in the grant; only land covered by navigable water, which would pass, was included thereby; they would obviously have proceeded immediately to the Herring gut, instead of the great shoal; whereas, if they run around the island X, and included it within the description, they were carried to the great shoal, and it then formed a proper terminus for their departure from the Herring gut, the place of beginning.

As to the objections to the release, the first, as to its not being proved, comes too late, it should have been taken on the trial; the other is entirely unfounded, for an obligation or contract of any kind can as well be released before breach as after; the only difference is that it requires more comprehensive terms to embrace a case before there is a breach. The words of this release, a copy whereof is appended to the record, was sufficiently comprehensive to embrace a case before breach.

Let the rule for a new trial be discharged.

Judgment affirmed.

Approved in *Marshall v. Fisher*, 1 Jones, 111; *Spruill v. Davenport*, Id. 203; *Clark v. Wagner*, 70 N. C. 707.

WILSON v. MYERS.

[4 HAWES, 73.]

NUNC PRO TUNC ENTRY of judgment, as of a date prior to the death of one of the defendants may be ordered, so as to avoid an error in fact for which a writ of error has been prosecuted.

STATUTE GIVING A NEW REMEDY does not alter the nature of the wrong complained of; if a tort before such statute was enacted, it remains a tort afterwards

A PETITION was filed against several defendants, complaining of an injury done the petitioner's land by the overflow of defendants' mill-dam. A trial was had and verdict and judgment given against all of the defendants. At the time of the rendition of the judgment two of the defendants were dead, and for the error in taking judgment against them a writ of error was prosecuted. On the return of the writ a motion was made below to amend the record by suggestion of the death *nunc pro tunc*, so as not to affect the representatives of those who had died. The motion was not then granted, but at a subsequent term was allowed on payment of costs, and the writ of error dismissed. Whereupon the defendant appealed.

Gaston, for the appellant. The amendment was improperly allowed, no amendment at a subsequent term is permitted after the rendition and enrollment of a judgment: 3 Bl. Com. 407; 1 Tidd. 658, 660; 2 Id. 862. There is no authority for this amendment, which is always regarded essential: 1 Tidd. 661; 2 Id. 822, 823; 1 Sellon, 401; 2 Id. 457; 1 T. R. 782. Our statute introduces no new rule with respect to amendment after judgment: *Parnell v. M'Crawley*, 2 Hayw. 177; *Baker v. Moore*, 2 Law Rep. 637. Amendments are never allowed, except to subserve the incontestible merits of the case.

Hogg, contra, cited, to show that suggestion of the death of one defendant was allowable after error brought to reverse a judgment: *Hamilton v. Holcomb*, 1 Johns. Cas. 29; *Dumond v. Carpenter*, 2 Johns. 184.

By Court, HENDERSON, J. The statutes of amendments and of jeofails, do not affect this question; it depends on the principles of common law alone. As a general rule, it is unquestionably true that no act of the court, as contradistinguished from the act of its officers, or the parties, can be allowed or amended, but during the term at which it was done. During the term the record is said to be in the breast of the judge; after it is over it is upon the roll. But this rule applies to such amendments, as call into action the judgment or discretion of the court, and not to such as are a matter of course. In such cases, the reasons of the rule no longer operate; for as much as the law confides in the integrity of the court, it admits a possibility of its being corrupt, and therefore guards it from temptation.

The case in 5 Term, 577, is an authority for this amendment, and there could not be one more in point; and Lord Kenyon, in a few words, gives the reason. It is a matter of course; the mo-

tion, if made at the proper time, could not be refused by the court. There can be no reason for not permitting it to be entered now for then, for it produces the same, and no other effect, than if it had been then entered. Upon its being entered, the error in fact assigned in this writ of error, no longer exists. The judgment cannot, therefore, be reversed for error in fact. Whether there be error in law, cannot be inquired into by virtue of the present writ of error; but if it could, I think that there are none; for although the statute has given a new remedy for injuries arising from mill ponds, the injury is still the same in its nature; it is a tort, in which all or any one or more are liable for the whole injury. It, therefore, survives against the survivors. Nor is it any objection that some of those who did the injury were mere temporary owners, and that their interest may have since ceased. If their interest was limited, it should have been offered (if indeed it could have afforded any objection), when the five years' judgment was about to be entered up. If their interest was then uncertain, and has since determined by casualty, their remedy is by *audita querela*, or some remedy in the nature thereof. If they are entitled to any relief, at any rate it will not justify the court, upon a bare suggestion that such may be the case, to reverse the original judgment. The writ of error must be dismissed, and judgment affirmed.

Cited in *Gillett v. Jones*, 1 D. & B. 346, 347, and *Butner v. Keolia*, 6 Jones, 61.

TAYLOR v. SHUFFORD.

[4 HAWES, 116.]

ESTOPPELS ARISING FROM CONVEYANCES OF BARGAIN AND SALE result entirely from the matters of fact affirmed in the deed.

A REBUTTER operates on the right of action to an estate, while an estoppel operates entirely on facts.

ESTOPPELS RESULTING FROM VARIOUS CONVEYANCES considered and explained. **THE SOVEREIGN POWER** is not estopped by its grants.

COMMON REPUTATION is admissible in questions of boundary.

ASTRONOMICAL OBSERVATIONS may be employed to find the true location of a line, and are likely to be more accurate than a survey made by commencing at the initial point and running by the compass.

EJECTMENT. The plaintiff's lessor derived title under a grant issued from the crown of England in 1768. Defendant claimed under a grant from the state of North Carolina of recent date, and contended that the land was within the boundaries of Earl

Granville's grant, which was antecedent to that under which plaintiff claimed. Evidence was offered showing that by several acts of the legislature of North Carolina, a certain line had been used as the boundary between various counties and was known as Granville's line. A witness, one Mushat, was also called by the defendant, who, by astronomical observations, laid out the Granville line so as to include the land in question. Defendant objected to this kind of evidence, denied that the alleged line was Granville's line, and contended that the line should be run according to certain natural boundaries.

The plaintiff never had actual possession of the land, but, living in another country, the defendant had acted as his agent for many years in taking care of it and in paying taxes thereon. The defendant admitted himself to be in the adverse possession.

The jury were instructed to find for the defendant, if they were satisfied that the land in dispute was within the chartered limits of the Earl of Granville's grant. Verdict for the defendant. A motion for a new trial being overruled, the plaintiff appealed.

Wilson, for the appellant, invoked the doctrines of estoppel, contending that the king granted this land to the Earl of Granville, then a part to the plaintiff; that the state afterwards acquired the Granville title by escheat, and its grant to the defendant could not divest the plaintiff of the right he had received from the king: Co. Lit. 270 b; 10 Mass. 155.

Badger, contra.

HALL, J. I can see no objection to the charge given by the judge to the jury in this case. The question of fact was, whether the lands in dispute lay within the boundaries of the lands granted by the king to Earl Granville; nor can I see any legal objection to the evidence offered to the jury relative to that fact. I would also think the question of law arising in the case free from doubt, if we take as true what the jury have found by their verdict, that is, that the land in dispute lies within the limits of Earl Granville's grant from the crown.

The plaintiff also claims title under a grant from the crown, in the year 1768, subsequent to the date of Earl Granville's grant. As the king had conveyed title to the lands in dispute to Earl Granville, it follows that at the time of the grant to the plaintiff's father, he had no title to the lands, and, of course, could convey none. "For if he enters without title, or seizes land by a void or insufficient office, he is no disseisor; but if the

king, by letters patent, grants land so seized, and the patentee enters, he is a disseisor, because he has time to inquire into the legality, which it is supposed the king has no leisure for." Gwillim's Bac. Ab. Prerogative, F. 3. Therefore, as the plaintiff's pretensions to recover in this action rest solely upon the grant from the crown, he must fail; nor do I think his claim is in any respect bettered by the revolution in government which took place afterwards, when the state succeeded to the rights of the crown, as well as to those of Earl Granville, because if at that time Earl Granville had not disposed of the lands, they still belonged to him, and, consequently, title to them vested in the state, and that title was not in any respect affected by any rights derived from the crown, because whatever right it once had to the lands, it had conveyed those rights to Earl Granville. For these reasons, I think the rule for a new trial must be discharged.

HENDERSON, J. It is contended by the counsel for the defendant, that were it true that the sovereign power, like an individual, could be estopped, yet where the conveyance is by grant, without warranty, express or implied, as in the present case, there can be no estoppel; and he refers the estoppel arising from bargains and sales, and other conveyances deriving their efficacy from the statute of uses, entirely to the express warranties which are attached thereto; and in feoffments, to the implied warranty arising thereon before the statute of *quia emptores*, from the services due from the feoffee and his heirs to the feoffor and his heirs; and since the statute to the warranty implied during the life of the feoffee, probably from the nature of the conveyance, or from an adherence to the rule after the reason of it had ceased, a thing not very uncommon in our law; as we will still retain many rules growing out of the doctrine of feuds, although feuds have long since ceased among us. I think that the counsel is wrong in attributing the estoppel to the warranty. The estoppel arises entirely out of the affirmations of matters of fact made in the deed. He has confounded estoppels and rebutters; things essentially different in their nature, although frequently producing the same results. A rebutter operates on the right of action to the estate. It operates as to strangers as well as between parties and privies, which is a consequence flowing from its operation on the right to the estate. An estoppel operates entirely as to facts; its effect is to conclude the parties from making, and of course, proving the facts to be otherwise than they are stated or acknowledged

to be in a deed or other transaction out of which the estoppel arises. My collateral ancestor deprives me of my estate, and makes a feoffment in fee to a stranger with warranty and dies; the warranty descends on me as his heir, and this is done under such circumstances as that it does not amount to what is called a warranty commencing by disseisin. In any controversy which I may have with any one in regard to the lands after the warranty has descended on me, this feoffment and warranty will bar my right of action to the estate. If I had lost my right of entry when the warranty descended on me, it is as effectual to bar or destroy my estate (and that with regard to the whole world) as if I myself had made a feoffment of it. But if I to-day should make a feoffment or bargain and sale of lands, which do not belong to me, to A., and to-morrow purchase the estate of B., to whom it belonged, although nothing in reality passed from me to A., I, having nothing in the estate, could not transfer anything to him; for a person cannot grant that which he has not; yet, in a controversy with B., I shall not be permitted, that is, I shall be estopped to aver, and, of course, to prove that I had nothing when I granted to him, and set up in myself the title which I afterwards had acquired of B.; for having affirmed in my conveyance to him that I had the estate, I shall not afterwards affirm that another had it. But this estoppel is confined entirely to parties and privies, it affects not a stranger; and as it affects not a stranger, neither will it affect me in a controversy with him, for the agreement between A. and myself, as to certain facts, does not make the facts in reality so. The agreement as to how they are is only binding upon us and our privies; in our controversies with others, we are at liberty to show how they really are. In a controversy, therefore, between myself and a stranger, if the stranger, for the purpose of showing that A. has title, and if A. had, I could not have it, shows my deed to him, it is competent for me to show that when I granted to A., I had nothing in the land, and I will prevail against him on my title derived from B.

Farther, to show that estoppels operate as to the facts only, if A., reciting that he had not an estate in the lands intended to be granted, but that another has, bargains and sells them to B.; if A. in reality had nothing in the lands, nothing passes, not even by estoppel, for there is affirmation against affirmation and of course no estoppel can arise. To use the language of Lord Coke, there is estoppel against estoppel; and the matter is left at large. So if one has an interest, although not as

large as the estate granted, as if lessee for life or years, bargains and sells in fee, the affirmation of title shall be confined to the estate for life or years, and no estoppel arises; as if A. is tenant for the life of B., and A. bargains and sells the lands to C. and his heirs, and A. afterwards purchases the reversion from the owner, and then B. dies, A. may recover the land from C., notwithstanding his deed to C. and his heirs; that is, the affirmation of title is confined to this, that A. had an estate during the life of B. Cases might be multiplied to show the difference between a rebutter arising from a warranty and an estoppel. We may add, also, which would seem of itself conclusive, that estoppels arise in cases where there can be no warranty. Acts *in pais*, acts in the country. Nor is the reason more sound that estoppels arise only from such conveyances as operate by way of transmutation of possession as a feoffment, and not on those which operate under the statute of uses; for as to their affirmation, and, of course, their estoppels, they are precisely alike.

A feoffment, accompanied by livery of seisin, passes the estate; there is, an actual tradition; the estate passes as to all the world, and any person may show it, because the fact is so. But in a bargain and sale, there is no actual tradition; the statute only transfers the seisin which the bargainor has; if he has none, none in reality is passed, and strangers cannot be affected by a thing which never happened; but as between the parties, the seisin shall be considered as passing, because the bargainor is estopped from showing that he was not seised, and if he was seised, the statute transferred it. As between the parties, the bargain and sale shall pass what it purports to pass; as to strangers, what it actually does pass. Thus, a feoffment in fee by a tenant for life is a forfeiture, because, as to all the world, it passes the fee; it displaces the estate of the reversioner, it is therefore an injury to him which is punished by a forfeiture of the life-estate. But if tenant for life bargains and sells the lands in fee, it is no forfeiture; for as to all but the parties to the bargain and sale (in which term I include privies), it passes only the life-estate, for that was the extent of the bargainor's seisin; and passing only the life-estate, it did not displace the reversion; it was, therefore, no injury to the reversioner, and therefore no cause of forfeiture. Nor do the authorities cited from Cruise and Sheppard support the position contended for. They were cases of releases, operating by way of *mitten le droit*, or extinguishment. In them no estate passed by the release, but only a right, say a right of action.

Rights are not the subject of transfers or conveyance, but estates are. A right to an estate is not demanded in an action, but the estate itself. Rights may be released or extinguished, but not granted. If A. is out of possession, and assigns or transfers to B., who has no estate in the lands, B. can sustain no action for the lands, as well for the reason that the subject-matter was not the object of a grant, as from the rule said to be founded on policy that no man can sell his right of going to law. If A. releases to B. all his right in certain lands, B. having no estate in the lands, nothing passes, not even by estoppel, for that cannot pass by estoppel, which in reality can not pass by a conveyance. In the cases cited, the releasor, by his release, affirmed that he had a right to the lands, and no estate therein; for a release presuppose the right to be in the releasor, and the estate in the releasee (I mean as to releases operating by way of *mitter le droit* or relinquishment), and the releasee can support no action on such an acquisition; it only confirms and strengthens the estate which he had before. If A., therefore, releases his right to B. in a certain estate which B. has in possession, and A. afterwards acquires a good estate in the lands, he may set it up, for it is a different thing from that which he affirmed he had in his release; and estoppels being odious, the party shall not be concluded from showing the truth, unless the affirmation be directly upon the point, not to be arrived at by argument and conclusion.

And this distinction between an estate and a right is almost daily acted on. In our actions on covenants for title and quiet enjoyment, if the right and the estate were the same thing, no breach could ever, with propriety, be assigned for breaches of covenants for quiet enjoyment contained in an indenture of bargain and sale; for in such cases the bargainee is as much estopped as the bargainor, but it is as to the estate, in which they are estopped. The breach is not that no estate passed, but that an estate did pass, but that the title to that estate was not good, and that he was disturbed in the enjoyment of that estate by one having title. In fact the very idea of annexing a warranty or covenant presupposes an estate to pass; for without the estate passes, there can be no warranty, which is a dependent covenant, as is a covenant for quiet enjoyment, although by the phraseology there may be an independent covenant, but it is not attached in law to the estate. This very clearly proves what is affirmed, and what estoppels arise out of a bargain and sale.

With respect to the case cited by the counsel for the plaintiff from Co. Lit., where Edward IV., was barred, that was clearly the case of a rebutter arising from a warranty made by his collateral ancestor, the duke of Cornwall, which descended on Edward IV. As to the case from Massachusetts, the operation of the resolve of legislature was not so much to declare where certain falls in the river were, as to locate a prior grant; it operated to locate the lands, where the legislature said the falls were, it operated as a new grant, which the legislature certainly had the power then to make it; it confirmed the old grant and fixed it at certain falls, and if such was not its operation, the decision was wrong, for a sovereign can not be estopped. But the sovereign power conveys neither by feoffment, bargain and sale, nor any conveyance dependent on livery of seisin or transferring uses into possession. By grant the sovereign will alone pass the property; evidenced by matter of record, and all grants from the sovereign are matters of record, and when under the great seal of the state prove themselves. And I know of no case where the sovereign power has been estopped; the cases are all the other way, and policy and justice require that they should be so. This sovereign or sovereign power is a trustee for the people, it acts by agents; the people should not be bound by any statement of facts made by those agents. For their benefit, the truth may always be shown notwithstanding any former statement to the contrary. Where the state, therefore, succeeded to the rights of the king, and to those of Lord Granville, it was competent for the state to show that the king's grant to the plaintiff in the year 1768, passed nothing, the king having granted the same lands to Lord Granville in the year 1744; for the king or sovereign power can not, any more than an individual, grant that which he has not. The lands in question were the property of the state, when the grant was made to the defendant, for the state, I think, certainly succeeded to Lord Granville's lands, by the most complete confiscation, by taking the very property to itself, as it did by the entry laws, and passed them to the defendant by its grant in 180—.

As to the evidence which was received to establish the line of Lord Granville, I can see no objection to it. Common reputation is certainly admissible in questions of boundary; and it was applied to this case much more consistently with the spirit of the rule, and the reasons on which it was founded, than when we permit a witness to swear that a person, since dead, told him that a certain tree in a remote wood was a line or cor-

ner tree of some other person's land; and, as to the observations made by Mr. Mushat, fixing the latitude, although such observations may not lead to absolute certainty, yet it is the best method which we have to ascertain the fact, and certainly better than by going down to the sea-shore and running out west, for the latitude can be as well taken here, or in Lincoln, as there. It would be impossible to continue the same course such a distance by the compass alone. Astronomical observations must, therefore, be frequently made to keep the course correct; for I do not agree with the plaintiff's counsel, but adopt the argument of the counsel for the defendant, that the cedar stake, or the houses by which the line is said in the charter to run, are nothing else than marks pointing to the line, which, notwithstanding those *indicia* given in the charter, is on the parallel of latitude thirty-five degrees and thirty-four minutes north. The rule for a new trial should be discharged.

Judgment affirmed.

Approved on the following points: that hearsay evidence may be admitted to fix boundaries, in *Hartzog v. Hubbard*, 2 D. & B. 243; and that the sovereignty is not estopped by the acts or declarations of its agents, in *Candler v. Lunsford*, 4 Id. 408; *Wallace v. Wallace*, 10 Ired. 110. It is also cited on the general question of estoppel in *Southerland v. Stout*, 68 N. C. 450.

HEARSAY EVIDENCE OF BOUNDARIES.—See note to *Speer v. Coate*, *post*.

BARDEN v. McKINNIE.

[4 HAWES, 279.]

LEVY ON CHATTELS vests a special property in the sheriff, by virtue of which he may retain them, and make a sale after the return day.

LEVY ON LANDS does not vest title in the sheriff, or give him any right of possession.

AFTER THE RETURN DAY of an execution, lands can not be sold under it, though levied upon before.

EJECTMENT. The plaintiff's lessor was a purchaser at an execution sale of the premises in question, under a judgment recovered against the defendant, and in favor of one Bradbury. The *fi. fa.* issued in May, 1820, returnable the following August term. But the writ was never returned, nor was an *alias* issued, but the land was sold in 1822 for one dollar, and the sheriff's deed executed to the plaintiff. It seemed that certain negroes had been sold by the sheriff in 1821, but sufficient had not been realized to satisfy the execution. The court instructed the jury

that the sale of land by the sheriff was without lawful authority and therefore void.

Verdict for the defendant. New trial refused. Appeal taken by the plaintiff.

Badger, for the appellant.

Gaston, *contra*.

TAYLOR, C. J. It is not necessary to the decision of this case to express any opinion as to the levy upon the land; if it were, I should think that the sufficiency of the levy might well be doubted. How or in what manner it was performed by the sheriff, whether by going to the land and making a declaration of it, or by a silent and mental volition, does not appear; but it does appear that no notice was given of it, and that the indorsement upon the execution was made after the writ was dead in law. It would lead to endless abuses if a sheriff could make a levy simply by an indorsement on the execution after its force was spent and the lien arising from the *teste* had ceased to exist, or had yielded its priority to other executions of later *teste*, issued, perhaps, in consequence of its being returned without any indorsement, and there being no *alias* ordered. It would be hazardous to purchasers, and inconvenient in general, if a sheriff were allowed to continue the lien of the *teste* by an *ex post facto* indorsement of a levy, where the law permits it to be continued only by *alias* executions, or the revival of the judgment. For if the sheriff, retaining the writ in his own possession, may do so after its force is spent, I can see no reason why he might not be permitted by the court to do it upon an execution returned without a levy and at a period when the writ had no longer any force.

But admitting that the levy was unexceptionable, the sale to the plaintiff was void for want of lawful authority in the sheriff to sell. It was not merely a purchase under an irregular execution, for that would not impeach the plaintiff's title, but a purchase without any execution. The general rule is, that all process must be served before the return-day; and as to chattels, if the levy be made in due time the sheriff may complete the same by sale after the return-day. But the reason of this is that the seizure of chattels vests a special property in the sheriff, who may take them into his own possession for the purposes of the execution. From the essential difference in the nature of the property, the operation of a *fi. fa.* issued against land must be different. It gives the sheriff no authority to take possession

of the land and turn the defendant out. He cannot break open an outer door to execute a *fi. fa.* against chattels; how then, upon the same writ, can he give possession of a house? A term for years may be sold on a *fi. fa.*, or a moiety of land delivered on an *elegit*, yet in neither case can the sheriff give possession. The purchaser and the creditor must obtain possession by ejectment. I apprehend that the sheriff has no right to change the possession of land, nor does he acquire anything by the levy but a right to enter for the purposes of the sale.

The seisin, the possession, and the right of possession, remain in the defendant until the sale, whose dominion continues unimpaired, except as to the *jus disponendi*. This was one effect of the levy; the other was to set apart this land to be converted into money according to the terms of the *fi. fa.* But there must be some lawful authority in existence for this conversion and sale; the sheriff clearly had none, for his had expired more than twelve months before the sale; and any private individuals might as legally have sold the land as the sheriff did in this instance. Though the statute of George II, and our act of 1777, have made lands liable to be sold on a *fi. fa.* equally with chattels, yet there are specific distinctions between the two sorts of property, to which even laws must be moulded in order to be useful. Land cannot be removed, therefore the sheriff incurs no risk after the levy, and possesses, consequently, no right, except that to enter for the purpose of a sale. After a sale he can give only the legal, not an actual, possession, and every purchaser knows that he must resort to an ejectment, unless the defendant is willing to surrender the possession. But with respect to chattels, he can not even sell them, unless they are present and so completely within his control as to enable him to deliver possession to the purchaser.

Though I am aware that the statute of 5 Geo. II, c. 7, was professedly intended to enable British subjects in England to sell real estates on execution in the colonies, in order to recover debts due to them, yet this then colony was no sooner emancipated than she passed a law for the purpose of rendering land liable to debts upon the deficiency of personal assets; yet I cannot conceive that the parliament, much less our own legislature, intended to give to sheriffs the right to take possession of the land upon the levy, at his discretion to turn the family out of possession, and to retain it himself until the sale. Nor has this been the construction of the statute in any of the colonies, for the defendant is never disturbed until the sale is consum-

mated, and then only by his own consent, without suit. Judging from the practice, therefore, pursued in this state, for no light can be obtained from the British cases, I should think that the proper mode would be to issue a *renditioni exponas* upon the return of a *fi. fa.* levied upon the land, and that in no other way, after a levy, can it be sold by the sheriff. I think the judgment should be affirmed.

SALES AFTER THE RETURN DAY.—As determining that the levy of an execution on lands after the return-day is invalid, the principal case is in harmony with the current of the decisions, and is followed in subsequent adjudications in North Carolina: *Tarkington v. Alexander*, 2 D. & B. 87; *Love v. Gates*, 2 Ired. 14; *Samuel v. Zachery*, 4 Id. 377; *Seawell v. Bank of Cape Fear*, 3 Dev. 279; *Maynard v. Moore*, 76 N. C. 162. In *Hathaway v. Howell*, 54 N. Y. 97, 109, it is stated to be a general principle that all process must be served on or before the return-day, and that a sheriff can not make a levy of an execution after it was returnable. Asserting the same rule are: *Cook v. Wood*, 1 Harr. (N. J.) 254; *Finn v. Commonwealth*, 6 Pa. St. 460; *Lofland v. Jefferson*, 4 Harring. 303; *Castleman v. Griffith*, Ken. P. Decis. 348. A purchaser at an execution sale where the levy and sale were made after the return-day of the writ acquires no title whatever: *Bank of Mo. v. Bray*, 37 Mo. 194; *Wack v. Stevenson*, 54 Id. 481; *McDonald v. Gronefeld*, 45 Id. 28; *Kimble v. Harris*, 36 N. J. L. (7 Vr.) 526; *McElwail v. Sutton*, 2 Bail. 361; *Love v. Gates*, 2 Ired. 14; *Gaines v. Clark*, 1 Bibb, 609; *Lehr v. Doe*, 3 S. & M. 468; *Ross v. McEartan*, 1 Brev. 507; *Vail v. Lewis*, 4 Am. Dec. 300; S. C. 4. Johns. 450; *Collins v. Waggoner*, Breese, 186; *Rangleley v. Goodwin*, 18 N. H. 217; *Frellson v. Anderson*, 14 La. Ann. 65; *West v. Shockley*, 4 Harring. 287. An arrest under a *ca. sa.*, after the return-day, is a trespass: *Stoyel v. Lawrence*, 3 Day, 1; and so is a levy under a *fieri facias*: *Vail v. Lewis*, 4 Am. Dec. 300; S. C., 4. Johns. 450. An officer receiving money after the return-day does not act in his official capacity, but merely as the agent of the defendant. Such payment does not make the officer's sureties responsible, nor does it satisfy the judgment unless accepted by the plaintiff: *Farmers' Bank v. Reid*, 3 Ala. 299; *Barton v. Lockhart*, 2 Stew. & P. 109; *Bobo v. Thompson*, 3 Id. 385; *Rudd v. Johnson*, 5 Litt. 19; *Edward v. Ingraham*, 31 Miss. 272; *Haralson v. Ingraham*, 10 S. & M. 581; *Harris v. Ellis*, 30 Tex. 4; *Planters' Bank v. Scott*, 5 How. Miss. 246. But an execution continues in force to and including the return-day thereof, and a valid levy may be made on the return-day, as well as on any other: *Wolley v. Mosely*, Cro. Eliz. 761; *Harvey v. Broad*, Salk. 626; *Gaines v. Clark*, 1 Bibb, 609; *Valentine v. Cooley*, 1 Humph. 38. When, under the law the writ is returnable to court, a question has arisen whether it continues in force after the adjournment of the Court on the return-day. In England it was held that at the adjournment of the court, the writ became *functus officio*: *Perkins v. Woolaston*, 6 Mod. 130; S. C., Salk. 321; and in America some decisions have been made on the authority of this English case, and, therefore, in harmony with it: *Prescott v. Wright*, 6 Mass. 20; *Blaisdell v. Sheafe*, 5 N. H. 201. But the English case was long since overruled in that country, and the law declared to be that the writ may be executed at any time during the return-day: *Maud v. Barnard*, 2 Burr. 812.

Wherever some statute does not provide otherwise, an officer who has entered upon the execution of the writ before the return-day thereof, by a *seis*

ure or levy upon property, may, after the return-day, and after the actual return, continue to hold the property, and may prosecute such further proceedings as may be necessary to convert such property, whether it be real or personal, into money, for the purpose of satisfying the judgment: *Phillips v. Dana*, 3 Scam. 551; *Cox v. Joiner*, 4 Bibb, 94; *Lester's case*, 4 Humph. 383; *Logsdon v. Spivey*, 54 Ill. 104; *Saving Institution v. Chinn*, 7 Bush, 539; *Heywood v. Hildreth*, 9 Mass. 393; *Smith v. Spicer*, 3 Ired. 256; *Kane v. McCown*, 55 Mo. 181; *Remington v. Linthicum*, 14 Pet. 84; *Wheaton v. Sexton*, 4 Wheat. 503; *Barnard v. Stevens*, 2 Aik. 429; *Lander v. Stone*, 1 Hawks, 329; *Stewart v. Severance*, 43 Mo. 322; *Taylor v. Gaskins*, 1 Dev. 295; *Wright v. Howell*, 35 Iowa, 288; *Gaither v. Martin*, 3 Md. 146; *Pettingill v. Moses*, 3 Minn. 223; *Wood v. Colvin*, 5 Hill, 230; *Moreland v. Bowling*, 3 Gill, 500; *Devoe v. Elliott*, 2 Cal. 243; *Bank of Mo. v. Bray*, 37 Mo. 194.

In some states it has been held, that as a levy on land does not create any special property therein, it can not confer any authority on the officer to sell after the return-day of the writ: *Overton v. Perkins*, 10 Yerg. 328; *Rogers v. Cawood*, 1 Swan, 142; *Seawell v. Bank of Cape Fear*, 3 Dev. 279; *Morgan v. Ramsey*, 15 Ala. 190; *Smith v. Mundy*, 18 Id. 182; *Shepherd v. Rhea*, 49 Id. 125. But this exception is contrary to the current of the authorities: *Pettingill v. Moss*, 3 Minn. 223; *Wood v. Colvin*, 5 Hill, 230; *Cox v. Joiner*, 4 Bibb, 94; *Phillips v. Dana*, 3 Scam. 551; *Remington v. Linthicum*, 14 Pet. 84; *Sexton v. Wheaton*, 4 Wheat. 503; *Bank of Mo. v. Bray*, 37 Mo. 194; *Wright v. Howell*, 35 Iowa, 288; see, also, *Mooney v. Mass*, 22 Iowa, 380; *Reddick v. Cloud*, 2 Gilm. 670; *Bellingall v. Duncan*, 3 Id. 477; *Tillotson v. Doe*, 5 Blackf. 590; *Butterfield v. Walsh*, 21 Iowa, 97; *Stein v. Chambless*, 18 Id. 474; *Irwin v. Pickett*, 3 Bibb, 343. In some of the states statutes have been passed requiring that the sale shall not be made after the return-day of the writ. Sales made in violation of these statutes have been adjudged void: *Lehr v. Rogers*, 3 S. & M. 468; *Kane v. Preston*, 24 Misa. 133; *Dale v. Metcalf*, 9 Pa. St. 108; *Cash v. Tozer*, 1 W. & S. 519. The rule allowing an officer to make a sale after the return-day of the writ, of property before then levied upon by him, is justified on the ground that title, when transferred by a sheriff's sale, relates back to the seizure or levy of the property sold, and, on the further ground, that otherwise the previous levy, which was authorized when made, might become a vain and purposeless act; but except for the purpose of justifying the detention and sale of the property previously levied upon, and execution after the return-day thereof is *functus officio*: *Cook v. Wood*, 1 Harr. (N. J.) 254; *Hathaway v. Howell*, 54 N. Y. 97; *Finn v. Commonwealth*, 6 Pa. St. 460; *Lofland v. Jefferson*, 4 Harring. 303; *Castleman v. Griffith*, Ky. Pr. Decia. 348.

See Freeman on Executions, sec. 106.

MOORE v. MOORE.

[4 HAWKS, 358.]

CONTRIBUTION AMONG CO-SURETIES does not arise from any contract between them, but from the principle that equality is equity.

IF INDEMNITY BE TAKEN BY A SURETY to secure him from loss, and as a condition precedent to his becoming a surety, his co-sureties are not entitled to the benefit of the indemnity until after he, for whose benefit it was given, is fully repaid.

INDEMNITY TAKEN BY ONE SURETY can not be reached by his co-sureties to his prejudice, unless it was taken for their benefit, or in fraud of their rights.

BILL in equity seeking contribution from the defendant, a co-surety with the plaintiff on the bond of one Jones, now deceased and insolvent. It appeared that judgment on the bond upon which the plaintiff and defendant were sureties, had been recovered against them, and each had paid half; but prior to the commencement of the action on the bond, Jones assigned certain slaves to the defendant as indemnity, in case he should be obliged to pay any portion of the debt. In answer to the bill the defendant alleged that the indemnity was for his sole benefit, and been given to him after the plaintiff had signed the bond, without any demand for indemnity.

HENDERSON, J. Contribution among co-securities arises not from any contract between them, but from a principle of natural equity; that equality is equity among persons standing in the same situation, and this being now the established and well-understood doctrine of a court of equity, it is sufficient to infer an understanding among them of mutual contribution, for men are presumed to act in reference to the laws governing the transaction. Hence it is that a court of law never sustains jurisdiction in cases where one surety seeks contribution from the other; but this principle of equity can only apply in cases where their situations are equal, for equality among persons whose situations are not equal is not equity. If one surety stipulates for a separate indemnity in this respect, his situation is different from that of one who makes no such stipulation, and this indemnity is reached in favor of his co-security, upon the ground either that it was intended for the benefit of all, or that the taking it was a fraud upon the others.

In such cases, courts of equity convert him into a trustee, not permitting him to allege his own turpitude or selfishness as a protection, for they enter into the agreement under a belief of perfect equality, trusting, apparently, to the same laws of indemnity, and to the united exertions of each other, to avoid harm severally; therefore, to take an indemnity is a fraud upon the rest, and more especially as it lessens the ability of the principal to indemnify the others, and if taken without such secrecy, it is presumed to be designed for the benefit of all, and an indemnity fairly obtained. And such indemnities may be fair, and which the surety has a right to use exclusively for his own benefit while he is indemnified, if more than sufficient for that pu .

pose, the excess should be communicated to the other sureties: 1. Because it gives to the creditor an equitable lien on such indemnity, and the creditor should cede, and in equity is supposed to cede to a suffering surety, all his means and facilities in enforcing and securing payment; and; 2. From the intimate connection subsisting between them, as being engaged in one common league, we have only to appeal to our own bosoms to ascertain the benevolent feelings excited by such connection, and the dictates of benevolence become duties when not prejudicial to ourselves; but in observing its dictates, we are not bound to encounter hazard or trouble, and, therefore, where this surplus lien is sacrificed to our good or safety in that transaction the co-surety has no right to complain.

The facts of this case preclude all idea that the complainant entered into the engagement under a false appearance of equality, and it affords as little evidence that it was designed also for his benefit, for he attested the instrument creating the lien. In truth, this appears to be a fair and explicit transaction. The complainant was willing to become Jones's surety without a lien, and without the participation of the defendant. Such proffer was made before the defendant was called on. Application was then made to the defendant, not at the instance of the complainant to aid him in encountering the risk, but the money could not be procured without an additional name on the paper; in this situation, the defendant stipulates for a lien, and this within the knowledge and presence of the complainant who required none, and negatived all idea that the defendant was acting for their joint benefit, by attesting the instrument creating the lien. He has, therefore, no claim, either on the ground of fraud or intention, and the claim to the excess, I think, stands on an equally slender foundation. Had the defendant wantonly or capriciously discharged the excess of the lien, the complainant would have cause of complaint; but if the defendant, for his own ease and convenience in the transaction, sacrificed it, he has none. All he can ask is, that he should have had it when it is not longer of any service to the defendant. Good faith as to this is all that equity requires. If, by sacrificing the excess, he more promptly and with less trouble and risk, obtained an indemnity, who has a right to complain? On whose rights or labors has he trespassed? Not on the complainant's; but I do not view the transaction at the sale of the negroes by any means as an abandonment; it may be so, but the answer does not admit it. But, as I have said before, that is entirely

immaterial. If he did so, it was for his accommodation, to avoid controversy, to make himself perfectly safe. In this he has violated no obligation, at least, none which a court of justice recognizes.

The bill dismissed with costs.

INDEMNITY GIVEN TO SECURITY.—In subsequent decisions in North Carolina the principle is announced that a surety, prior to his becoming such, may fairly stipulate for a separate indemnity for himself, and that in case he do so, his co-sureties are entitled to the surplus only, after his exoneration: *Pagan v. Jacobs*, 4 Dev. 263; *Long v. Barnett*, 3 Ired. Eq. 631; *Hall v. Robinson*, 8 Ired. 56; in each of which *Moore v. Moore* is followed. Under such circumstances a co-surety cannot claim that the indemnity was taken for his benefit if there is no element of fraud. The reason uniformly assigned for subjecting to the satisfaction of all the co-sureties' claims an indemnity received in some cases by one of their number is, that equality is equity; and that where several are carrying the same burden, anything done to relieve one should also be applied to the relief of the others. But where a person stipulates for an indemnity before his liability shall attach, his condition is not the same as that of the surety who has entered upon his obligation without any such indemnity. There was no equality between them at any time, and, therefore, the maxim of equity is not invoked.

The general rule regarding indemnity taken by a surety is thus stated by Brandt on Suretyship, sec. 233: "If one of several sureties, after all have signed, and before the debt has been paid, and without any agreement to that effect before he became liable, obtains from the principal anything for his indemnity, such indemnity inures to the benefit of all the sureties, and the surety obtaining it immediately becomes the trustee of it for the benefit of all the sureties, even though he obtained it by his own exertions and it was intended for his sole benefit." This proposition expressly recognizes as an exception the doctrine of the principal case. And in support of his statement the author refers to *Seibert v. Thompson*, 8 Kan. 65; *Steele v. Mealing*, 24 Ala. 285; *Miller v. Sawyer*, 30 Vt. 412; *McLewis v. Ferguson*, 5 The Rep. 330; *McCune v. Bell*, 45 Mo. 174; *Hartwell v. Whitman*, 36 Ala. 712; *Smith v. Conrad*, 15 La. Ann. 579; *Ilinsdill v. Murray*, 6 Vt. 136; *Leary v. Chishire*, 3 Jones Eq. 170; *Low v. Smart*, 5 N. H. 353; and the North Carolina decisions above cited. In the fourth edition of *Leading Cases in equity*, the editors make a similar qualification in stating that the indemnity received by one surety inures to the benefit of all: Vol. 1, 171, in the note to *Dering v. Earl of Winchelsea*.

BELL v. BLOUNT.

[4 HAWES, 384.]

INJUNCTION TO PREVENT A NUISANCE from being created or erected will be issued.

BILL for an injunction setting forth that the defendant intended erecting a mill and dam in the vicinity of the town of Tarborough, and at a short distance from the public academy of that place; that on the site where the intended mill was about

to be erected a mill formerly stood, but now destroyed, during the existence of which the health of the inhabitants had materially suffered; that if the defendants were allowed to erect their intended mill, great and irreparable mischief would ensue to the health of the inhabitants of the town, and the noxious vapors arising from the pond would lead to the entire destruction of the academy. The answer admitted the intention to erect the mill and dam, but denied that any injurious consequences would follow therefrom.

A motion to dissolve the injunction was denied, but the injunction was retained until the hearing.

Mordecai and Seawell, in support of the motion.

Gaston, contra.

TAYLOR, C. J. Two inquiries are presented by the argument in this case: The first relates to the power of the court to interpose the preventive remedy of an injunction; the other, whether it is proper to exercise the power under the evidence and circumstances of this case. It is manifest that without some jurisdiction competent to prevent a threatened evil of the sort complained of, there would be a great defect of justice in this state; for when the injury, if done, can not be repaired in damages, it is essential to the protection of rights that this court, whose process is alone adequate to the occasion, should interpose its summary remedy, to compel persons so to use their own property as not to injure that of others. It has accordingly been long settled as a principle of the court, that in cases where irreparable mischief may be done, as of waste, or in a plain case of nuisance, an injunction will immediately be granted. Where there is a clear right to the enjoyment of the subject in question, and an injurious interruption of that right, which in equity ought to be prevented, this court will not withhold its aid, and this rule is abundantly established by the authorities: 1 Vern. 120, 127, 275; 2 Ves. 414; 2 Atk. 391, and many others.

It appears to me that the evidence in this case approaches as nearly to ascertain the certainty of the apprehended evil, if not prevented, as can be expected from the nature of the subject. There was formerly a millpond nearly in the situation where the defendant proposes to establish his, and during the whole time of its being kept up, the whole community, particularly the younger part of it, were subject to destructive autumnal diseases. Soon after the mill was broke and the pond emptied, a visible improvement took place in the healthfulness of the

place, children were raised to maturity, the population increased, and a seminary of learning erected within what was before the sphere of pestilential influence; of these facts it is impossible to doubt after reading the depositions. Is it not to be expected that the same causes, if put into operation, will produce the same effect? Nor is the probability of this lessened by the proposed alteration in the site of the pond; its size and the situation of the mill. The utmost allowance that can be made on this point, is that it may not render the town quite so unhealthy; but if the court sees that not merely in the fears of the inhabitants, but a moral certainty exists that if this work is suffered to proceed, the health of this community will again be put in jeopardy, it is its bounden duty to interpose. Indeed, it is impossible to shut our eyes to the fact that in this climate a collection of stagnant water in the neighborhood of a town, will render the inhabitants unhealthy; and however different theories may be pressed into the service of accounting for it, or plans proposed to mitigate the evil, the painful conviction forces itself upon us that the effect invariably follows the cause, and no antidote has yet been discovered.

Under this observation and experience, a court might be satisfied with much less evidence than has been adduced in this case. I am of opinion that the injunction ought to be made perpetual.

HALL, J. This is not a case where it is necessary to controvert the question, whether this court will interfere by injunction or not, before a trial at law is had, declaring that to be a nuisance or not, which in the bill is set forth to be one. No such question in this case can be tried at law, no nuisance exists; the object of the bill is to enjoin the defendant from creating one, and it does appear to me that it is a proper case for this court's interference.

The nuisance which it is apprehended will arise from the erection of a mill, does not appear to me to be a phantom created by the fears of the witnesses, but a reality, bottomed upon past experience. It is not likely that the effects of ponded water would be less deleterious now than formerly, the same causes produce the same effects. I think the injunction ought to be made perpetual, with costs.

HENDERSON, J., was of the same opinion, so the injunction was made perpetual.

CASES
IN THE
SUPREME COURT
OF
OHIO.

WRIGHT v. LATHROP.

[2 OHIO, 33.]

A judgment against one of several joint trespassers is not, unless satisfied, a bar to an action against the others.

TRESPASS with force and arms for taking and converting goods. The defendant pleaded not guilty, and that plaintiff had prosecuted a separate action against one Burroughs for the same trespass. The plaintiff demurred to this plea, and the defendant joined in demurrer.

Whittlesey, Newton and Sloan, for the plaintiff: It is a universally admitted proposition that torts are in their nature joint and several. The plaintiff may sue all the trespassers in one action, or each of them in separate actions, and each is liable for the acts of all. Recovery alone without satisfaction is no bar to another action against a co-trespasser. If it were a bar, the plaintiff might commence separate suits, as he had a right to do, and the suit first tried might be pleaded by way of *puis darrein continuance*, and this would impose upon him a bill of costs in each of the remaining suits, and the doctrine that the plaintiff has an election *de melioribus damnis*, would also be destroyed, for there must be more verdicts than one to give the plaintiff an election. They cited in support of the demurrer: *Livingston v. Bishop*, 1 Johns. 290 [3 Am. Dec. 330]; 1 Phill. Ev. 32, n. 6; *Morton's case*, Cro. Eliz. 30; *Johnson v. Brown*, 1 Wash. 187.

Wright, for the defendant: In torts the action is joint or several, at the election of the plaintiff or defendant. It is believed to be a universal rule in trespass, that where the defenses are

joint and the damages several, the plaintiff may elect to take a judgment for the best damages; but in cases where the suit is joint, but the pleas are several, and the damages severally assessed, the better practice is to allow the plaintiff to enter a *nolle prosequi* as to all the co-trespassers, except the one against whom the best damages are assessed. The right to elect is as to taking judgment, not as to taking execution or satisfaction. This doctrine is questioned nowhere except in New York.

The plaintiff may, at any time before final judgment, enter a *nolle prosequi*, but cannot do so after judgment: 1 Tidd Pr. 632; *Noke v. Ingham*, 1 Wils. 89; *Shields v. Perkins*, 2 Bibb, 229. Counsel cited and commented at great length upon: *Hill v. Goodchild*, Bull. N. P. 94; 1 Tidd Pr. 632; 2 Id. 805; *Heydon's case*, 11 Coke, 5; *Dale v. Eyre*, 1 Wils. 306; 2 Tidd Pr. 804; Bull. N. P. 20; 2 Tidd Pr. 670; Rastall's Entries, 654; *Crane v. Hummertone*, Cro. Jac. 118; *Rodney v. Strode*, Carth. 19; *Cooke v. Jenner*, Hobart, 66; *Parker v. Sir J. Lawrence*, Id. 70; *Mitchell v. Millbank*, 6 T. R. 199; *Sabin v. Long*, 1 Wils. 30.

Different actions cannot be brought against different trespassers for the same trespass; and if brought, the second suit may be pleaded in bar of the first. And the plaintiff can not sever and bring suit against one for part, and against another for other part of the same trespass: 1 Swift's Digest, 532; *Boyle v. Bayliff*, 1 Campb. 60. He also cited and reviewed at some length *Morton's case*, Cro. Eliz. 30; *Brown v. Woolen* Cro. Jac. 73; *Baker v. Lovett*, 6 Mass. 68 [4 Am. Dec. 88]; *Ammonet v. Harris*, 1 Hen. & Munf. 488; *Wilkes v. Jackson*, 2 Id. 355. He then reviews at great length, and criticises the decision of Kent, C. J., in *Livingston v. Bishop* [3 Am. Dec. 330], claiming that it was rendered under a misapprehension of the law. He claimed that we may deduce from the cases cited by him: 1. That the person injured by several joint trespassers may bring suit against any or all of them; 2. When the defendants join in their defense, the verdict and judgment must be entire; 3. When the defendants sever in their defense, the jury may assess either joint or several damages. If several damages are assessed, the plaintiff may enter a *cessat executio* until after trial against the others, and then on entering a *nolle* as to the rest, may elect to take judgment for the best damages; 4. When several suits are brought, the plaintiff has the same election on the same conditions; 5. But in no case can the plaintiff take two judgments for the same trespass, for the first judgment may be pleaded in bar of a second recovery.

By Court, SHERMAN, J. The only point presented by the pleadings is, whether a judgment recovered by the plaintiff against one joint trespasser is a bar to an action brought against another for the same trespass. I am aware that the authorities on this subject are by no means clear or reconcilable. An examination of the English reports will show that though there is no modern case where the precise question made by this plea has been adjudicated upon, yet the principles upon which it rests have been often discussed. In *Bird v. Randall*, 3 Burr. 1345, Lord Mansfield observed, that in case of joint trespass, the defendants were all liable to the plaintiff, and he might proceed against one or all of them as he pleased, yet he shall have but one satisfaction from all. In *Drake v. Mitchell et al.*, 3 East, 251, Lord Ellenborough says: "I have always understood the principle of *res sit in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered, operating as a change of remedy, from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, till then, it can not operate to change any other collateral concurrent remedy which the party may have."

That each joint trespasser is answerable for the act of all, and that the plaintiff may pursue his remedy against one or all is unquestioned. He is entitled to a compensation in damages for the injury he sustained by the commission of the trespass. This compensation he may recover from one or all of the joint trespassers. His remedy against them severally is concurrent, and they are *quasi* collateral security for each other, until the plaintiff has obtained satisfaction. It would seem to follow, from this doctrine, that a recovery of a judgment against one joint trespasser would be no bar to a suit and recovery against another. If a judgment against one of several joint trespassers is of itself a bar to all legal proceedings against the others, it will, in a great degree, deprive the plaintiff of his right of bringing several suits, and of his election *de melioribus damnis*, as each defendant, except in the suit first tried, may plead *puis darrein continuance*, the recovery in that suit as a bar to the plaintiff's further proceeding, thereby limiting the plaintiff to the recovery of a single verdict, and subjecting him to the payment of costs in all the suits but the one first tried. If a joint action be brought against all the trespassers, they may sever in their pleas, and the several issues made may be

tried by different juries, and separate and different damages assessed; and the plaintiff has his election of the damages so assessed, which shall bind all the defendants: *Heydon's case*, 11 Co. 5.

The case of *Brown v. Wooten*, Yelv. 67; Cro. Jac. 73, is the only one I have been able to find in the English reports where a plea of a former recovery against a third person for the same injury, without an averment of satisfaction, was held good. That was an action of trover for goods; the defendant pleaded a judgment and execution in favor of the plaintiff against one J. S., for the same goods, and the plea was sustained. In *Livingston v. Bishop et al.*, 1 Johns. 290 [3 Am. Dec. 330], Chief Justice Kent, speaking of the case of *Brown v. Wooten*, says it was clearly introductory of a new rule, and cites *Brooke*, Judgment, pl. 98; *Morton's case*, Cro. Eliz. 30, and that many cases subsequent to that seem to disregard it, and make the satisfaction against one trespasser the test of the plea. In *Brown v. Wooten*, the plaintiff had sued out his execution on the judgment against J. S., and if that is to be considered an election by the plaintiff *de melioribus damnis*, it will conclude him from pursuing the other joint trespassers. But in the case at bar, the plaintiff has not issued an execution on the judgment recovered by him, or done any other act from which it would be inferred he had elected the damages recovered by the verdict and judgment mentioned in the plea.

The court of appeals in Virginia has decided that a verdict and judgment against one of several joint trespassers, was a bar to a recovery against the others: 1 Hen. & M. 488; 2 Id. 355. The supreme court of New York, in *Livingston v. Bishop et al.*, 1 Johns, 290 [3 Am. Dec. 330], determined that a recovery against one joint trespasser is not a bar to a suit against another, and this decision has been adhered to by the same court in a number of subsequent cases. When the authorities present so much uncertainty and contradiction on the subject, the court feel themselves at liberty to adopt that rule which to them appears most consonant with reason and justice. And the rule which appears the more rational to the court, and in accordance with the general principles of law applicable to the action of trespass, is that the plaintiff may elect to bring separate actions for a joint trespass, and may have separate verdicts and judgments, but that he can have but one satisfaction. This will preserve to the plaintiff the right, which all the authorities admit he has, to bring a joint suit against all, or a several suit

against each joint trespasser; and also to secure to him his election *de melioribus damnis*.

The opinion of the court accordingly is, that the plea in bar is insufficient and the demurrer thereto sustained.

The court held, in *Bell v. Miller*, 5 Ohio, 250, that all concerned in the commission of a trespass are considered as principals; and if one person employ another to commit a trespass, both are guilty and both responsible in damages; see, also, note to *Caldwell v. Sacra*, 12 Am. Dec. 285. The decision in *Sheldon v. Kibbe*, 8 Am. Dec. 176, is in full accord with the principal case.

LESSEE OF JOHNSON v. HAINES.

[2 Ohio, 55.]

A CERTIFICATE OF ACKNOWLEDGMENT of a deed, in which the person taking the acknowledgment gives himself no official designation or title, is insufficient and the record of the deed is invalid.

THE plaintiff, at the trial, offered in evidence a duly certified copy of a deed, together with a copy of the certificate of the person taking the same. The acknowledgment did not show that the person signing it was an officer of any kind. The plaintiff offered other evidence to prove that the person who took the acknowledgment was at the time a justice of the peace, duly commissioned and qualified. The copy of the deed and the evidence to prove the official character of the person who took the acknowledgment were, on the objection of the defendant, rejected, and the plaintiff was nonsuited. Plaintiff moved for a new trial, and the decision of the motion was adjourned to this court.

Leonard, for the plaintiff.

Atkinson, for the defendant.

BY COURT. When a copy of a deed, certified by the recorder is offered in evidence, instead of the original, its admissibility depends upon the fact whether the original has regularly been admitted to record; for the mere fact of recording a deed, without the legal requisites, gives it no validity. The statute providing for the execution and acknowledgment of deeds, which was in force when this deed was recorded, required that the execution of all deeds for the conveyance of lands should be acknowledged by the grantor, or proved by the subscribing witnesses, before some judge or justice of the peace, and recorded in the proper county. The acknowledgment or proof is nothing

unless it be taken by an authorized officer, and whether the person be authorized or not, is a fact which ought to appear in the certificate of the officer himself. This, *prima facie*, would be sufficient to authorize the record, and to throw the proof on the person impeaching the deed. In this case, nothing of the kind appears in the certificate, or attached to the subscription, consequently the deed was not duly recorded, and the copy can not be received as evidence.

Proof distinct from the certificate upon which the record was made, that the person who took the acknowledgment was, in fact, a justice duly qualified, could not be received at the trial; because it was a copy, and not the original, to which the evidence was intended to be applied. We do not decide what would be the law had the original deed been in court, and proof offered that the person who took the acknowledgment was a justice. We think it clear that in the case of a copy, such proof can not be received. The record being irregular, the original is not proved, and until that is done, a copy can not be used. The court decided correctly in rejecting the testimony, and the motion for a new trial must be overruled.

This case is cited by the court in *Lessee of Livingston v. McDonald*, 9 Ohio, 168, and distinguished from it by the fact, that there it appeared from the certificate that the person taking the proof was an officer authorized by law to perform such act; and it was decided not to be necessary for such person to say, in so many words, that he was authorized to take such proof. On the effect of a defective acknowledgment of a deed, see *Watson's Lessee v. Bailey*, 2 Am. Dec. 462; *Simon v. Brown*, Id. 368; *Gittings' Lessee v. Hall*, Id. 502. In *Share v. Anderson*, 10 Id. 421, it was held that an acknowledgment taken in one county before a justice of the peace of another county is void. A certificate of acknowledgment will not be good, unless it shows clearly that it was taken by an officer authorized by law: *Cassell v. Cook*, 11 Id. 610. On defective acknowledgment by married women, see note to *Jourdan v. Jourdan*, Id. 724.

ELLIS v. BITZER.

[2 OHIO, 89.]

A RELEASE OF ONE OF SEVERAL JOINT TRESPASSERS, releases all, though the party giving the release stipulated that it should not discharge the others.

THE ACCEPTANCE OF THE NOTE of one of several co-trespassers in satisfaction of the wrong done by him, releases the others, although the note remains unpaid, and is brought into court to be canceled.

TRESPASS, assault and battery. The original writ was sued out against five defendants, Bitzer, Townsend, Whitacre, Wil-

liams and Adkins. As to the two last named it was returned *non est*. The other three appeared and pleaded not guilty. They also pleaded two special pleas, to the effect that after the commencement of the suit, Smith, agent of the plaintiff, received and accepted from Williams and Adkins their note, in satisfaction for the trespass as to them, and he agreed to forbear further prosecuting the suit against them. Issues were joined upon these pleas. The testimony was reduced to writing, and agreed to be as follows: W. S. testified that he was authorized by the plaintiff to conduct the suit against the defendants, but had no special authority to compromise. He settled with Williams and Adkins, and took their note payable to himself; in consideration of which he agreed that they should not be further prosecuted. He believed he had sufficient influence with the plaintiff to induce him to acquiesce in what he had done. The note was in the hands of plaintiff's attorney. It had not been paid, nor had any offer been made to surrender it.

J. E. testified that at the time of the making of the compromise it was distinctly understood to be made for Williams and Adkins alone. They were to be entirely discharged from the civil suit; but it was not to be a satisfaction for the rest.

J. G. testified the same as the last witness, and, further, that Smith directed an indorsement to be made on the note of a part of the sum for which it was given; that the note was made for a larger amount than was to be actually paid by Williams and Adkins, in order that plaintiff might be able to obtain from the others a considerable sum on compromise.

J. M. G. testified that he heard the plaintiff say to his attorney: "What S. has done I suppose I must agree to."

The suit as to Williams and Adkins had neither been prosecuted nor discontinued. The plaintiff's counsel produced the note in court and offered to cancel it. A verdict was taken for the plaintiff, subject to the opinion of the court on this point reserved, whether in law the testimony taken supported either of the special pleas. The court gave judgment for the defendants, and the plaintiff appealed.

Hammond, for defendants. It is settled that an agreement not to sue upon a particular cause of action amounts to a release. Although it can not be pleaded as a release, the fact may be pleaded, and is, upon being proved, a bar to the plaintiff's action: *Cuyler v. Cuyler*, 2 Johns. 187; *Harrison v. Close*, Id. 449 [3 Am. Dec. 444.] The agreement not to sue in this case was

made upon good consideration. By making the note on one side and accepting it on the other, the agreement was completely executed. Payment of the note was not necessary to make it a satisfaction, for that was not a part of the agreement.

Wright, for plaintiff. Accord without satisfaction is not a good plea. A bare promise of future satisfaction is not good, and if it remains executory it is no bar. An agreement not to sue a single debtor has been held to operate as a release; but where two are liable, an agreement not to sue one is not a bar to a suit against the other.

By Court, *SHERMAN, J.* This case is presented to the court in the form of an agreed case, but it is so only in name. The parties, instead of agreeing upon the facts, have agreed upon the testimony which the defendants could give in support of their second and third pleas, and ask the determination of the court, whether that testimony sustains either of those pleas. This is in effect submitting the issues in fact to the court, instead of the jury, upon a written statement of the testimony of the witnesses; a course of proceeding not sanctioned by our practice. The parties, however, having agreed that if the evidence contained in the written statement does not support either the second or third plea, that judgment may be entered in favor of the plaintiff for a specified sum, the court will not delay the parties, or put them to the expense of having the finding of a jury upon the issue in fact, made upon those pleas. Upon the pleadings and proofs in the case, three questions have been made: Was the note, mentioned in the plea, executed and received in satisfaction of the trespass, complained of in the declaration? Is a discharge of one of several joint trespassers a discharge of the whole, where the parties have expressly stipulated it shall not have that effect? Is a note, given for a trespass, which remains unpaid, and in court to be canceled, a satisfaction?

The first is purely a question of fact, and depends upon the testimony. The proof is that Smith, the agent of the plaintiff to conduct the suit, but without any special authority to settle, compromised with Williams and Adkins, who were jointly concerned with the defendants in the trespass complained of, and whose names were inserted in the writ, took their note for one hundred and fifty dollars, and agreed to forbear to sue them; that it was distinctly understood that the compromise was only for Williams and Adkins; that they were to be wholly

discharged from liability for damages on account of the trespass, but that it was not to be a satisfaction for the other joint trespassers; and that the plaintiff, after being informed of the compromise made by his agent, said he supposed he must be bound by what Smith had done. Without going into a particular discussion of the facts, the court are satisfied that the note, mentioned in the third plea, was executed in satisfaction of the trespass complained of, so far as Williams and Adkins were concerned therein; and that it was received by the plaintiff in satisfaction is apparent from the fact of the note being in his possession, and by him brought into court, as well as from the testimony that it was so received by Smith, his agent, for conducting the suit. It was executed and received with the intent and for the purpose of discharging Williams and Adkins, the makers, from all further liability on account of their being jointly concerned with the defendants in the trespass, but with an express stipulation that it should not discharge the other co-trespassers.

That a release of one of several joint trespassers operates a discharge of all, is a position too clear to admit of doubt. The authorities on this point are uniform, full and clear: 1 Hob. 66; Co. Lit. 232, a. An accord and satisfaction of a joint trespass by one is good for all concerned. The act of one of several joint trespassers is the act of all; they all unite to do an unlawful act, and each is responsible for the acts of the others. The plaintiff may elect to sue them jointly or separately, and may pursue them until he has obtained satisfaction, but he can have but one recompense in damages for the same injury. The plaintiff here agreed to take the note of Williams and Adkins, two of the trespassers, for one hundred and fifty dollars, and to forbear to sue them; the note was given, and it was understood they were fully discharged, and he has thus made his election, not only as to the amount he would receive as a recompense for the injury he sustained from the assault and battery committed by the defendants jointly with Williams and Adkins, but also of the persons from whom he would recover that recompense. He has been satisfied for the trespass committed upon him, and to permit him to recover in this action would give him another recompense for an injury already satisfied. It can make no difference that it was part of the agreement between the plaintiff's agent and Williams and Adkins, that the giving and receiving the note mentioned in the pleas, was not to be a satisfaction for the other trespassers. Each joint tres-

passer being liable to the extent of the injury done by all, it follows as a necessary consequence that satisfaction made by one for his liability, operates as a satisfaction for the whole trespass, and a discharge of all concerned. Williams and Adkins could make no agreement impairing the legal rights of the defendants, nor cede to the plaintiff the privilege these defendants had of availing themselves of any matter forming a legal defense to this action. The accord and satisfaction mentioned in the third plea operated in law as a discharge of these defendants from liability for the injury complained of by the plaintiff, and it was not in the power of other persons to deprive them, by any agreement of theirs, of the benefit of this legal discharge. The plaintiff can not complain, for he has agreed upon the quantum of damages he sustained by the trespass, and has received the note of Williams and Adkins in satisfaction from, and discharge of them, and they can not complain; for as joint trespassers, they are liable to make the plaintiff a full recompense in damages for all the injury he sustained by the commission of the trespass.

The remaining question is, whether a note given for a trespass, which remains unpaid, and in court to be canceled, is a satisfaction. An accord without satisfaction is not good. The party must not only have agreed to accept, but he must actually have accepted, before it will amount to a satisfaction in law. A naked promise to make satisfaction at a future day, for a trespass, is not a bar to an action brought to recover damages for that trespass. It must be shown that the promise has been executed by the payment or delivery of what was agreed to be received in satisfaction, or the injury in law remains, and with it the right to recover a recompense. In this case the evidence shows that the accord was executed and the satisfaction actually made. The plaintiff agreed to accept the note of Williams and Adkins, two of the joint trespassers, for a specified sum in discharge of their liability for the trespass. The note was accordingly made and accepted by the plaintiff. The discharge of Williams and Adkins was immediate upon giving the note, and did not depend upon payment of the money. The agreement was to receive the note in satisfaction, and the accord was executed when the note was made and delivered. The contract of the parties looked only to the execution and delivery of the note; and Williams and Adkins were to be discharged, not on the payment of one hundred and fifty dollars, but upon their giving to the plaintiff their note for one hundred and fifty dol-

lars. It was not an accord without satisfaction or a mere promise to make satisfaction at a future day, but an adjustment between the parties of the amount of recompense to which the plaintiff was entitled, and a present satisfaction. The plaintiff's right of action for the trespass was gone by the acceptance of the note; and it will not revive either against the makers or the other joint trespassers by the non-payment of the money at the time stipulated in the note, or by the plaintiff producing it in court and offering to cancel and deliver it to the defendants. The plaintiff has, by his agreement, substituted one cause of action for another, and he can not resort to both, or either, at his election. He has accorded with, and received satisfaction from, part of the joint trespassers, and thereby discharged the whole; and he cannot deprive the defendants of the benefit of that discharge by offering to surrender that which he has received in satisfaction for the trespass. Judgment must be entered for the defendants on the third plea.

BEGGS v. THOMPSON.

[2 OHIO, 95.]

PURCHASER OF LAND AT SHERIFF'S SALE is not thereby in actual or constructive possession, and, therefore, cannot sustain an action of trespass for the crops where he does not obtain possession by ejectment.

TRESPASS quare clausum fregit, adjourned from the supreme court of Columbiana county, on an agreed case upon the following facts: Thompson, the defendant, mortgaged the premises in question; a *scire facias* was prosecuted upon the mortgage, the land taken in execution, sold by the sheriff, and purchased by the plaintiff, to whom, after an order confirming the sale, the sheriff made a deed. The defendant being in possession, the plaintiff demanded possession of him, which was refused. He then instituted a suit in forcible detainer against him and obtained judgment, but it was reversed on *certiorari*. Nearly a year after the sale the defendant, who had been in possession and receiving the crops, abandoned that possession and plaintiff took possession, after which he brought this suit to recover for the rents and profits of the land. The question presented to the court is whether or not such action can be supported.

J. C. Wright, for plaintiff. It is objected to the plaintiff's having judgment: 1. That he can not recover without having obtained the possession by judgment and *habere facias*; 2. That

he can not recover after possession for any time before possession. A person having title may enter peaceably into possession without judgment, and then his possession inures according to his title: *Jackson v. Haviland*, 13 Johns. 235; Adams on Eject. 98. A sheriff's deed relates back to time of sale: *Jackson v. Dickenson*, 15 Johns. 309 [8 Am. Dec. 236]; Adams on Eject. 71. Where once an entry has been made, it will have relation to the time the title accrued, so as to enable the claimant to recover the mesne profits from that time: Adams on Eject. 335.

Any person having title may enter into possession if he can do so without breach of the peace: *Rogers v. Pitcher*, 6 Taun. 202. The refusal of a judgment-debtor whose land is sold under execution to give possession makes him a trespasser, and he is liable to be turned out as such, and is responsible, in that character, for the mesne profits: *Smith v. Stewart*, 6 Johns, 49 [5 Am. Dec. 186].

In trespass for the mesne profits, it is not necessary to prove a writ of *habere facias* executed: Bull. N. P. 87; Adams on Eject. 336. If the plaintiff seek to recover the profits antecedent to the demise or bring his action against a precedent occupier, the record in ejectment can not be given in evidence, but the plaintiff must prove his title and an entry on the land: Bull. N. P. 8; Adams on Eject. 334.

Loomis and Metcalf, for the defendant. Trespass for injury to real or personal property can not be maintained without possession. Possession of personal property may be constructive, but that of real property must be actual: *Putnam v. Wyley*, 8 Johns. 432 [5 Am. Dec. 346]; *Van Brunt v. Schenck*, 11 Id. 385. A right of possession, not coupled with possession in fact, at the time of the injury, is not sufficient to sustain trespass *quare clausum fregit*. That action is founded on an injury to the possession: 2 Phil. Ev. 132, 133. The adjudications on this point are numerous and uniform. Counsel then reviewed the following authorities: 6 Bacon's Abr. 566; Bro. Tresp. pl. 38, 315, 346; 2 Roll. Abr. 554; 6 Bacon's Abr. 566; *Browning v. Beston*, Plowd. 142; *Van Nuys v. Ferhem*, 1 Johns. Cas. 82; Bro. Tresp. pl. 12; 2 Roll. Abr. 569; Plowd. 431; 6 Bac. Abr. 568. They contended that under the authorities cited, the plaintiff could not recover under the form of action which he had elected.

They next reviewed the American decisions, and claimed that they were equally as conclusive as the English authorities

cited above. The cases reviewed are: *Campbell v. Arnold*, 1 Johns. 511; *Tbby v. Webster*, 3 Id. 468; *Stuyvesant v. Tompkins*, 9 Id. 61; *Wickham v. Freeman*, 12 Id. 183; *Taylor v. Townsend*, 8 Mass. 411 [5 Am. Dec. 107]; *Starr v. Jackson*, 11 Id. 519. The judgment in ejectment is conclusive only from the time of the demise; beyond that time it proves nothing: *Van Alen v. Rogers*, 1 John. Cas. 283 [1 Am. Dec. 113]; 2 Phil. Ev. 210; *Askin v. Parkin*, 2 Burr. 668. The better opinion seems to be that the plaintiff in an action for mesne profits shall recover only from the time of the demise: *Shotwell v. Boehen*, 1 Dall. 172.

Tuppan, for plaintiff in reply, contended that the plaintiff may recover for time anterior to the demise upon other proof than the record in ejectment. He claimed that there were no cases, except those in Johnson, which say that the plaintiff can not recover. He cited and reviewed *Proprietors of Kennebeck v. Call*, 1 Mass. 483; *Starr v. Jackson*, 11 Id. 519; *Langdon v. Pother*, 3 Id. 215; *Gore v. Brasier*, Id. 523 [3 Am. Dec. 182]. He claimed that the delivery of the deed is livery of seisin; and if it is so by the party, it is so by the sheriff.

By Court. It is impossible to maintain that the purchaser of land in Ohio, at sheriff's sale, can be considered as in the actual or constructive possession in consequence of such purchase. He obtains a right of possession only; and where adverse possession is persisted in, he must resort to legal process to invest himself with it. A summary process of forcible detainer is given to him, and when he proceeds in that manner, his possession can only commence from the time he obtains it, in virtue of the writ of restitution. From a careful examination of all the authorities cited, we are satisfied that a plaintiff can not maintain this action of trespass without showing an actual possession in himself at the time the trespass complained of is committed. The action for mesne profits, founded upon a recovery in ejectment, rests on grounds peculiar to itself. The doctrines that govern it have never been extended to cases where possession of lands, held adversely, has been obtained by other means.

The cases cited from Massachusetts do not apply. They are all predicated upon the particular provisions of the statutes of that state. There the growing crops are valued with the lands, and the whole together set off to the plaintiff in discharge of his claim. The officer is commanded by his writ to deliver seisin and possession to the plaintiff. Thus an actual posses-

sion commences, and a price is paid for the emblements. It is not so here. The land is valued without reference to the crop. The officer has nothing to do with giving possession. The person to receive it is uncertain until the sale is effected; and at the sale the purchaser pays for the land only. The cases are essentially distinct in all their principal features. Judgment must be given for the defendant.

In *Cassidy v. Rhodes*, 12 Ohio, 95, the court, after laying down the proposition that at judicial sales the right of debtors can be saved only by regarding the annual crops as personalty requiring a separate levy, say: "The case of *Beggs v. Thompson*, although decided on other grounds, adopts these premises and barely abstains from expressing this result." As to the necessity of possession in order to maintain trespass, see *Putnam v. Wyley*, 5 Am. Dec. 346; *Carson v. Noblett*, 6 Id. 554.

FULTON v. STUART.

[2 OHIO, 215.]

ASSIGNEE OF LEASE.—If a lessee assigns his lease for a shorter period of time than that for which it was granted, or if he assign or underlet as to part only of the premises, the lessor can not sustain an action against the assignee or sub-lessee for rent.

COVENANT. Action brought from Muskingum county. The declaration sets forth a lease for years from the plaintiff to one Munson, and alleges that the right, title, and interest of the said Munson to the demised premises, except thirty feet square of vacant ground came to the defendant by assignment, and assigns the non-payment of the rent reserved as a breach. The defendant demurred generally, and the decision was reserved.

Silliman and Spangler, in support of the demurrer, cited *Hartford v. Hatch*, Doug. 183, as settling the doctrine that an assignment of a lease for any period short of the full term was but an underletting, and that the lessor could not maintain an action against the assignee for the rent. They contended that an assignment of a part of the premises was as much an underletting as the assignment of the whole for a part of the term.

Culbertson, for the plaintiff, cited 2 Chit. Pl. 455, 456; and argued that the assignee was liable for rent upon the privity of estate, and not upon the privity of contract, and that the same rule ought not to be applied to the assignment of a part of a term and one of a part of the premises.

By COURT. It seems to be settled that where a lessee assigns his lease for any shorter period of time than that for which the lease was granted, the lessor can not sustain an action of covenant against the assignee upon the lease; because this is considered, not an assignment of the whole term, but an underletting. The principle applies with at least equal force to the case of an assignment, or underletting of part of the premises only. If the lessee constitute two under-tenants, by assigning one third of the leased premises to one, and one third to another, retaining one third himself, the lessor may have three distinct actions; and in apportioning the rent, the aggregate given against each might amount to more or less than the amount reserved, and the parties in either case would be without remedy. If the lessee underlet or assign the whole premises in unequal quantities, to different persons, the lessor will be driven to as many actions against different persons to recover his rent, instead of having one action against the lessee. For the separate assignee of a part can neither be charged with the whole rent individually, nor jointly, with one or more of his co-tenants.

In this case the declaration states that the defendant was not assignee of the whole premises; he did not take, and does not hold, the whole term of the original lessee. The demurrer must, therefore, be sustained.

REMEDIES BY LESSOR AGAINST ASSIGNEE AND SUB-LESSEES—REMEDIES AGAINST ASSIGNEES.—The lessor has against the assignee of the lessee the same right of action that he has against the original lessee, for the breach of all covenants in the lease, which are annexed to the estate, as long as he is in possession. "For when a covenant relates to, or is to operate upon, a thing in being, parcel of the demise, the thing to be done by force of the covenant is, as it were, annexed to the thing demised, and goes with the land, binding the assignee to performance, though not named; and the assignee, by accepting possession of the land, subjects himself to all the covenants that run with the land:" Taylor on Land. and Ten., sec. 437; *Spencer's case*, 5 Coke, 16; *Blake v. Sanderson*, 1 Gray, 332; *Prettyman v. Walton*, 34 Ill. 175; *Jacques v. Short*, 20 Barb. 269; *Verplanck v. Wright*, 23 Wend. 506; *Bally v. Wells*, 3 Wils. 25; *Van Rensselaer v. Bradley*, 3 Denio, 135; *Hurst v. Rodney*, 1 Wash. C. C. 375; *Van Rensselaer v. Bonesteel*, 24 Barb. 365; *Dolph v. White*, 12 N. Y. 296. The assignee will also be bound, if expressly named, by a covenant concerning a thing not in esse at the time of the demise, but which is to be done upon the land, as, for instance, to build a wall thereon, because he is to receive the benefit of it: *Norman v. Wells*, 17 Wend. 136; *Masury v. Southworth*, 9 Ohio St. 340. The foundation of the liability of the assignee is the privity of estate that exists between him and the lessor: *Quackenboss v. Clarke*, 12 Wend. 555. The assignee is therefore, not bound by collateral or personal covenants contained

in the lease: *Dolph v. White*, 12 N. Y. 296; *Jones v. Smith*, 14 Ohio, 606; *Mayor, etc. v. Pattison*, 10 East, 130; *Webb v. Russell*, 3 T. R. 393. He is liable only so long as that privity subsists by his remaining in possession as legal assignee, and he may, at any time, terminate his liability by assigning to another: 2 Platt on Leases, 216; Taylor on Land. and Ten., sec. 444; *Stern v. Florence S. M. Co.*, 53 How. Pr. 478; *Carter v. Hammett*, 18 Barb. 608.

REMEDIES AGAINST SUB-LESSEES.—“Between the lessor and the under tenant of the original lessee, there is neither privity of estate nor privity of contract; the lessor, therefore, cannot sue the under tenant upon the lessee’s covenant to pay rent:” *McFarlan v. Watson*, 3 N. Y. 286; *Quackenbush v. Clarke*, 12 Wend. 555; *Harvey v. McGrew*, 44 Tex. 412; *Bedford v. Terhune*, 27 How. Pr. 422; S. C., 30 N. Y. 453; *Jennings v. Alexander*, 1 Hilt. 154; *Holford v. Hattch*, Doug. 183. In the last case, Lord Mansfield, delivering the unanimous decision of the court, said: “This is an action of covenant by a lessor against an under-lessee, and the single question is, whether the action can be maintained against him, as being substantially an assignee. For some time we had great doubts; we have bestowed a great deal of consideration on the subject, and looked fully into the books, and it is clearly settled (and is agreeable to the text of Littleton), that the action cannot be maintained, unless against an assignee of the whole term.” And, as the conventional relation of landlord and tenant, created by agreement, express or implied, must exist between the parties, in order to maintain an action for use and occupation, this action will not lie against an under-tenant: *McAdam’s Land. and Ten.*, 59; *Bancroft v. Wardwell*, 13 Johns. 489; *Wood v. Wilcox*, 1 Denio, 38; *Hall v. Southmayd*, 15 Barb. 32. But in *McFarlan v. Watson*, 3 N. Y. 286, where a lease was executed for a year at a quarterly rent, and the defendant, who entered under the lessee at the commencement of the term and occupied for the whole year, paid the three first quarters’ rent to the agent of the lessor, and took receipts from him as such agent, it was held that a jury might infer an agreement to pay the rent to the lessor so as to sustain an action in his name for use and occupation during the last quarter of the term. “The land, however, is not discharged by an under lease, from the claims of the original lessor, who notwithstanding the under lease, may proceed to distrain or evict either tenant or under-tenant, if rent be in arrear, or a forfeiture shall have been incurred by his lessee:” Taylor on Land. and Ten., sec. 109; *Arnaby v. Woodward*, 6 Barn. & Cress. 519. In order to clearly comprehend the nature and extent of the remedies of lessors against assignees, it is necessary to consider:

1. WHAT COVENANTS RUN WITH THE LAND.—In discussing this question, Harris, J., in *Van Rensselaer v. Bonesteel*, 24 Barb. 367, says: “Much learning has been expended sometimes to little purpose in endeavoring to define the boundary between real covenants or such as run with the land, and those which are merely personal. A most elaborate effort to accomplish this end was made by Mr. Justice Cowen, in *Norman v. Wells*, 17 Wend. 145, and yet, after all his researches, that indefatigable judge was forced to declare that the authorities still left the application of old principles to new cases, a very nice exercise of the mind, and remaining in greater degree a matter of judicial discretion, than almost any other of equal importance in the law of property.” In *Van Rensselaer v. Bonesteel*, *supra*, it was decided that a covenant to pay rent ran with the land. So in *Norman v. Wells*, *supra*, a covenant not to put in operation a rival mill, was held to run with the land. Examples of other covenants that have been decided to run with the land are, for quiet

enjoyment: *Suydam v. Jones*, 10 Wend. 181; to insure, if the insurance is to be laid out in rebuilding: *Vernon v. Smith*, 5 Barn. & Ald. 1; to repair: *Demarest v. Willard*, 8 Cow. 206; to discharge the lessor from taxes and assessments: *Post v. Kearney*, 2 N. Y. 394; to maintain a partition fence: *Kellogg v. Robinson*, 6 Vt. 276; not to build a house in front of the demised premises: *Trustees of Watertown v. Cowen*, 4 Paige, 510; a covenant by a lessor to supply the premises demised with a sufficient quantity of good water, at a rate therein mentioned: *Jourdain v. Wilson*, 4 Barn. & Ald. 266.

2. WHAT CONSTITUTES AN ASSIGNMENT.—“An assignment of a lease is the transfer of a tenant's whole estate therein to some third person:” Taylor on Land. and Ten., sec. 426. In order to constitute an assignment, the assignor must have conveyed the whole of the term, for if a single day is reserved, it will be a sub-lease, and not an assignment, and the sub-lessee will not be liable to pay rent to the lessor: *Davis v. Morris*, 36 N. Y. 569; *Post v. Kearney*, 2 N. Y. 394. But if the whole estate in a part of the land is conveyed, it will be an assignment: *Van Rensselaer v. Gallup*, 5 Denio, 454. In *St. Clair v. Williams*, 7 Ohio, part 2, 111, the court say: “But a plain distinction is made between the holder of a part of the land and the holder of a part of the estate.” In that case it was decided, that a widow evicted of lands assigned to her as dower, by title paramount to her husband, could not sustain an action upon the covenant of warranty to her husband, because she did not hold the whole estate. The right of action on the warranty passed to the heirs, and her remedy was by a new assignment of dower; but where a lessee, by a written instrument, transfers to another all his interest in the demised premises, it is an assignment, although in form a sub-lease: *Woodhull v. Rosenthal*, 61 N. Y. 382; *Bedford v. Terhune*, 30 Id. 453. So where a lessee sold the right to use and possess the real estate as long as he himself could, the arrangement was held to be in legal effect an assignment: *Indianapolis M. & C. N. v. Cleveland C. C. & I. R. Co.* 45 Ind. 281. But where a lessee executed an instrument conveying the whole of his unexpired term, but reserved to himself a different rent from the original lease, and a right of re-entry on non-payment, and provided for a surrender to him of the premises on the expiration of the term, it was decided that the instrument was a sub-lease, and not an assignment, and that the lessee had not parted with his whole interest in the premises: *Collins v. Hasbrouck*, 56 N. Y. 157.

Where demised premises are found in the possession of one not named in the lease, the law raises the presumption that he is in as an assignee, and not as an under-tenant. And the same presumption arises from the payment of rent to the landlord. But such possession and payment are *prima facie* evidence only, which may be rebutted by proof that the person charged as assignee never had an assignment: *Armstrong v. Wheeler*, 9 Cow. 88; *Carter v. Hammett*, 12 Barb. 253; *Cross v. Upson*, 17 Wis. 618; *Mariner v. Crocker*, 18 Id. 251; *Ebling v. Fuylein*, 2 Mo. App. 252. If a lease of land embraces personal property also, the lessee's covenant to replace or pay for it, at the end of the term, does not bind the assignee of the lessee: *Allen v. Culver*, 3 Denio, 284; *Jones v. Smith*, 606.

LESSEE OF BENTLEY'S HEIRS v. DEFOREST.

[2 OHIO, 221.]

AN ASSIGNMENT OF A DEED, indorsed thereon, does not convey any interest in the lands therein described.

EJECTMENT. The plaintiff offered in evidence a deed of the premises in question from Adgate to Vanderbarrack, with an indorsement thereon subscribed by the latter, by which he assigned all his right and title in the deed to Bentley, under whom the lessors of the plaintiff claimed as heirs at law, and rested his cause.

Webb, for the defendant, moved to overrule the testimony and for a nonsuit, on the ground that the deed and assignment did not show title to the premises in the ancestor of the lessor.

Wheeler, for the plaintiff, contended that the laws of Ohio did not prescribe any particular form for transferring title to real estate. That the assignment was in fact a deed, and the intention of the parties was sufficiently manifest to require the court to give it effect.

By Court. There never has been a time since the establishment of the territorial government, when the title to real estate could be conveyed by an assignment indorsed on a deed. The ordinance for the government of the territory provided that real estates might be conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person, being of full age, in whom the estate might be, attested by two witnesses, provided such conveyances be acknowledged, or the execution thereof duly proved and recorded, etc. This form of conveying real estate has been recognized ever since.

The indorsement relied on as a deed conveys nothing but the instrument itself. It may vest in the assignee a right to the paper and the wax, but it cannot affect the title to the land. It does not describe the land, or purport to convey it, much less does it contain the operative words of a grant. It is an assignment of all the right and title of the assignor in the deed on which it is written. In equity it might be considered as an executory contract and on proof of the facts connected with it, might entitle the assignee to a decree for a specific performance, but it cannot operate as a conveyance of the legal title.

Judgment for defendants.

MATTOX v. MATTOX.

[2 OHIO, 232.]

DIVORCE WILL BE REFUSED when the applicant is guilty of the same crime of which he complains.

BILL for divorce. The principal charge relied on in the bill was the adultery of the husband, which was very satisfactorily proved; but it appeared on cross-examination of witnesses that the complainant was living and cohabiting with another man, by whom she had had a child.

By COUNSEL. The bill must be dismissed. It would be a libel on the legislature to suppose that the statute was designed for the convenience of that class of characters to which the parties seem to belong. It was intended for the relief of injured innocence, not to encourage persons of loose morals, or rather of no-morals at all, to live in the open, scandalous violation of the common rules of decency.

The application is to the equitable jurisdiction of the court, and must be decided by the principles which prevail in courts of equity. The complainant must come with clean hands and a chaste character, not stained with the same infamy and crime of which she complains. These parties are *in pari delicto*, and to grant relief to either of them would be offering a bounty to guilt. It would place the permanency of the marriage contract, in every case, at the disposal of the contracting parties, and remove one of the strongest motives to that correctness and chastity of conduct which is necessary to render the marriage state either pleasant or convenient.

The ground on which this bill is dismissed is not new in the practice of this court. Many have been dismissed for a similar reason, and we had reason to believe that the practice was sufficiently known to prevent applications liable to this objection.

Bill dismissed.

See note to *Pierce v. Pierce*, *ante*, 211.

LESSEE OF MASSIE'S HEIRS v. LONG.

[2 OHIO, 237.]

DEATH OF DEFENDANT IN EXECUTION after it has issued and been levied does not prevent the officer from proceeding; but if defendant die after execution sued out, and before levy, the execution can not proceed, and any sale thereafter made is void.

THE ASSESSMENT OF "PART OF A LOT" or of "one acre of a lot," without any location, is too vague to authorize or support a sale.

TENANTS IN COMMON may make a joint demise.

PROCHAIN AMI can not make a demise in ejectment.

EJECTMENT. The title of the lessors of the plaintiff was founded on a patent issued to them since their father's death as heirs at law, to take as tenants in common and not as joint tenants. The patent was given in evidence and defendant's possession admitted.

Defendants set up title in themselves; 1. Under an execution sale; 2. Under a sale for taxes. The sale upon execution was founded upon a judgment against Massie in his life-time, which had been kept alive by suing out executions thereon. Massie died in 1813. In 1818 an execution was sued out against Massie as against a person in life, the property levied upon and regularly sold by the sheriff and a deed thereof duly made. Defendants are in possession under the purchaser. The premises in question are a part of out-lot No. 43, on the plat of the town of Chillicothe. The tax title rested upon the following facts: There were adduced in evidence, the corporation record showing the levy of the tax for the year 1816, the appointment and qualification of the collector, the advertisement of the time of sale and deed to Hillings. The list in which the lots were charged with the tax was given in evidence. In one place upon this list a part of out-lot No. 43 was charged with a tax. In another place, "one acre of out-lot No. 43" was charged with a tax in the name of Long, one of the defendants. Parol evidence was offered to show that the "one acre" named in the list was on the north quarter, where Long lived, which is the lot in question. The testimony was objected to and overruled. Verdict for the plaintiff.

Defendants moved for a new trial, on the following grounds: 1. The title under the sheriff's deed was valid; 2. The title under the sale for taxes was valid; 3. Tenants in common can not make a joint demise; 4. An infant cannot make a lease by *prochein ami*.

Douglas, in support of the motion, contended on the first point that the lien of the judgment was not affected by the death of Massie; that the suing out of execution after the death of Massie was at most an irregularity which could not be taken advantage of in this action: He cited *Jackson v. Delancy*, 13 Johns. 550 [7 Am. Dec. 403]; *Jackson v. Robins*, 16 Id. 576; *Young v. Young*, 2 Binn. 227; *McCrea v. Bartlett*, 8 Johns. 361.

On the second point, the proof of the regularity of sale was complete. The description of the property was sufficient, because it could be rendered certain by proof.

On the third point, tenants in common can not make a joint demise: Co. Lit. 45 a. n.; Run. Ejec. 222; 2 Bac. Abr. 423.

On the fourth point. A *prochein ami* is only appointed to take charge of a suit. He has nothing to do with the estate, and can make no disposition of it for any purpose.

Leonard, on the same side, submitted an argument on the first point, that the award of execution was a judicial act upon which a writ of error would lie: Bac. Abr. 450, 452, 453, 484. If a judicial act, it must be reversed directly, and can not be questioned collaterally.

Bond, for the plaintiff, contended that an execution sued out against a dead man was void, and not merely irregular. The dictum of Kent, J., in *Jackson v. Delancy*, was not authority, and was not received as such in *Jackson v. Robins*. None of the cases were decided upon that ground. That the cases cited on the first point did not apply; that as to the tax title, the evidence did not show any assessment of a tax, nor was the lot properly or sufficiently described. Parol evidence could not be admitted to help the insufficiency of the descriptions. The better and modern doctrine is that tenants in common may make a joint demise. In this case, the lessors of the plaintiff took by descent, and are therefore parceners, and upon the old principle can make a joint demise. The statute answers the fourth point: "If an infant be entitled to any action, his guardian or next friend shall be admitted to prosecute for him:" Ohio L. vol. 22, 83. A lease made by an infant is voidable only, and not void: Bac. Abr. Leases, B.

By COURT. It is well settled that if the defendant die after execution is sued out and levied, that the execution proceeds as if death had not taken place. The reason generally given for this is, that execution is an entire thing, and having once commenced, can not be stopped. But there is undoubtedly a much more satisfactory reason to warrant the proceeding, at least in the case of a levy upon chattels. By the levy the property of the defendant in the goods is divested, and the sheriff acquires a special property, which it is his duty to divest himself of according to the exigency of the writ. No rights are affected by this proceeding but those of the actual parties; no other interests are touched. If the defendant die after execu-

tion sued out, and before levy made, the execution can not proceed. And the reason is this: the sheriff is commanded to take the property of the defendant, but by his death, this becomes impossible. His right of property terminated, and other rights have commenced. Whether this right rests in the heir, administrator, executor or devisee, it matters not. The right of property is changed, and with that change the authority of the sheriff, under the execution, to take it, is gone. He might as well levy the property of an entire stranger.

The proposition is not affected by the fact that the property of a deceased person remains liable in some shape for the satisfaction of the judgments against him. The law has prescribed the mode of reaching it in the hands of those to whom it passes at the death. And that method must be pursued. It may, for the sake of argument, be conceded that an execution issued upon a judgment, where the defendant is dead, is not void, but voidable only; its effect is not the less nugatory. There is nothing upon which it can operate. It commands that to be done which is impossible. If the officer seize chattels of which the defendant died possessed, they belong to the personal representative. If he levy on land, it is the property of the heir or devisee. The only true return he can make is that there is nothing upon which he can levy. We have carefully examined the cases cited by the defendant, in which it is said to be adjudged that a sale of lands upon execution sued out and levied, after the death of the judgment-debtor, is so far valid that it can not be questioned collaterally on the trial of an ejectment. The cases do not sustain this position. In the case of *Jackson v. Delancy* [7 Am. Dec. 403], a *scire facias* to revive the judgment was issued, served, and a judgment rendered upon it. It was alleged that the person to be affected was not a party, and that as to her, the case stood as if no *scire facias* had issued. What weight this had in the decision, we can not tell. Judge Kent himself placed the cause upon the ground that the description of the lands in the sheriff's deed was too indefinite and vague to convey title.

The case of *Jackson v. Robins* is open to the same objection. There was a *scire facias*, and it was served upon the party claiming in that case, and judgment rendered on it, so that the point now before us was not decided, although discussed and some remarks made upon it by Judge Kent. We have every possible respect for the opinions of that distinguished jurist, but we can not adopt the arguments he has thrown out

upon this subject. He says he "takes the law to be that even the omission altogether of the *scire facias* will not, as of course, render void a sale under execution." He illustrates this position by referring to cases where executions, sued on judgments, after a year and a day, were held not to be void, but a justification to the party who acted under them. He supposes that there is no difference between such cases, and one where the defendant was actually not in existence. And he cites the case from 2 Binney, as in point to sustain his opinion. But we think the cases are materially and essentially different. In the first case there is no change of parties, nor of interests. The defendant on the judgment against whom execution issues, is a living party, competent to protect his own rights. It is upon his property that the execution is to be levied, and when so levied, the command of the writ is strictly complied with. No rights are interfered with but those of a party to the judgment. It has been already shown that in case of the defendant's death, the rights of property are changed, and other parties are interested. This single consideration destroys all analogy between the two cases.

By our laws the personal goods of a decedent constitute the primary fund for the payment of debts. It is only when they are exhausted that land can be subjected in aid of them. If upon execution against the deceased, a sale of land could be valid, the heir might be greatly prejudiced. The personal representative having the personal estate in his possession, the sheriff could not touch it, the land only could be levied on, and thus might be swept away for the payment of debts, when in fact the personal estate is sufficient. The heir or devisee may thus be deprived of his estate without any opportunity to defend it. The concession that such execution is irregular, and may be set aside at a proper time, does not remedy the mischief. The heir is no party, and is not bound to know or take notice of the proceeding. On the contrary, the maxim of the law is that he should have a day in court, not to be sought for by himself, but upon the call of the plaintiff. We think that there is a much stronger necessity in this case for a *scire facias* against the heir or devisee than in the case of a judgment where the defendant is alive, but no execution has been sued within the time limited by law.

We do not consider the case from Binney as any more in point than those from New York. In that case a *scire facias* was sued out as in the New York cases, and there was a judgment

upon it. The defect in the service was an irregularity but the judgment upon it was not, therefore, void. The execution issued upon a judgment against a living defendant, party to that judgment, not, as in this case, against a deceased defendant. In that case the execution was levied upon the land of a living defendant; not, as in this, upon the lands of persons neither parties nor privies. It was clearly a case of irregularity, which amounted to error, but could not make the judgment a nullity. The cases from Massachusetts are all judgments against executors or administrators; and in that state lands are assets in their hands, so that the doctrine there can have no application here. It is, therefore, the opinion of the court that the sale by the sheriff was inoperative and did not divest the lessors of the plaintiffs of their title. Upon the second point there can be no difficulty. The assessment of a tax upon a "part of a lot," or "one acre of a lot," without quantity or location, in the one case, or without location in the other, is too vague and indefinite to authorize a sale of any part or in any place. By the fifty-ninth section of the judicial act it is provided that "in all actions of ejectment the plaintiff shall have the same benefit and advantage from a joint demise that he could from several demises." This embraces the case of tenants in common. We have so settled this term in the case of the *Lessee of Wilkinson v. Fleming*, from Butler county.

The objection, that infants can not make a lease by *prochein ami*, is fatal to the plaintiff's recovery for all that he claims upon the demises of the infants. Although the demise is a mere fiction, it is treated for many purposes as a real transaction. If the lessor of the plaintiff die, pending the suit, it does not abate, because the nominal plaintiff survives. If, pending the suit, the lessor convey his interest in the land, the plaintiff may still recover. The lessor, by transferring the fee, can not destroy the term of the lessee, but must convey subject to it. The demise for the purpose of justice is thus considered a real transaction, and must, therefore, have the appearance of a legal one. A *prochein ami* has no power to lease the land of his protegee. He is neither attorney nor guardian. His office is solely to prosecute the suit, and for this purpose it is not necessary he should execute the supposed lease. A person acting in the character of an infant's friend could not make a lease of lands that would bind the infant or give the lessee a right of possession. Such a lease, though fictitious, yet being a necessary part of the plaintiff's right to recover, must be equally inoperative for that pur-

pose. The verdict is incorrect and must be set aside. Except for the undivided part of the lessor, who, being of age, joined the *prochein ami* in the demise.

Judgment accordingly.

In *Wilkinson's Lessee v. Fleming*, 2 Ohio, 301, the authority of the principal case was held to be decisive. It was cited and followed, on the point that a sale under an execution issued after the death of the defendant confers no title to the purchaser, in *Lessee of Cartney v. Reed*, 5 Ohio, 221. In *Lafferty's Lessee v. Byers* it was held that "original quantity one hundred and seventy. Acres to be sold seventy-three" was an insufficient description, and the principal case cited in support of the decision. So in *Burchard v. Hubbard*, 11 Ohio, 316, its authority was recognized on the point of insufficiency of description. It was cited to the same point in *Stanberry's Lessee v. Nelson, Wright*, 766.

Execution does not abate by the death of the plaintiff after a *fi. fa.* has been levied: *Buckner v. Terrill*, 12 Am. Dec. 269. If a judgment-defendant die, execution cannot issue without a *sci. fa.* unless tested in the life-time of the defendant: *Woodcock v. Bennet*, 13 Id. 568 and note 587.

SERGEANT v. STEINBERGER.

[2 OHIO, 306.]

JOINT-TENANCY does not exist in Ohio.

IF A DEVISE BE MADE TO HUSBAND AND WIFE they take as tenants in common.

ERROR to reverse a decree of chancery. The bill was filed to obtain partition of certain lands, one fifth of which the complainants claimed in right of Mrs. Sergeant as heir at law to her mother. It charged that McNiel, by his last will, bequeathed and gave to his daughter and to her husband Steinberger, and their heirs and assigns forever, three hundred acres of land, etc. That Steinberger and wife took possession of the land. That Mrs. Steinberger died before her husband, leaving five children, of whom Mrs. Sergeant, the complainant, was one. That Steinberger, after the death of his wife, devised the land in question to his three sons, the defendants. Defendants demurred, and the court of common pleas sustained the demurrer and dismissed the bill.

King, for the defendants. The devise to Mrs. and Mr. Steinberger vested each with an entirety of the interest, and neither could separate it without the consent of the other. On the death of the wife the whole survived to the husband.

Bond, for the complainants. Joint-tenancy is contrary to the

genius of our institutions, and is in effect abrogated by the laws of Ohio.

By COURT. It has more than once been decided by the supreme court, on the circuit, that estates in joint-tenancy do not exist under the laws of Ohio. The reasons which gave rise to this description of estate in England never existed with us. The *jus accrescendi* is not founded in principles of natural justice, nor in any reasons of policy applicable to our society or institutions. But on the contrary, it is adverse to the understandings, habits and feelings of the people. We have no statute recognizing the existence of any such principle as the right of survivorship. But we have various statutory provisions inconsistent with it. The laws passed both during the territorial government and since, authorize joint-tenants, tenants in common and coparceners, and in some cases the executors, administrators, or guardians of such persons to demand and have partition. It is, from this, evident that the legislature have treated a joint-tenancy as a tenancy in common.

It is well settled that the joint-tenancy of husband and wife varies in many principles from other joint-tenancies. The estate could not be severed, which resulted most probably from the fact that the wife could do no act separate from her husband. The conviction of one of the parties of treason did not work a forfeiture of the other's right. And this was, we may fairly infer, a principle introduced to lessen the number of forfeitures, which were always odious. But the right of survivorship was the same as in other cases of joint-tenancy, and in the case of husband and wife, is as much at variance with our laws and usages as in the common case. Upon the death of Mrs. Steinberger, her undivided half of the land devised descended to her children, who became tenants in common with their father. The complainants show a good title to one fifth of their mother's part, constituting one tenth of the whole tract, and appear to be entitled to have that tenth set off to them.

The decree of the court of common pleas is reversed, and the cause sent back to be further proceeded in.

Cited in *Wilson v. Fleming*, 13 Ohio, 68, and held to be decisive of that case on the point that joint-tenancy does not exist in Ohio. The principal case recognized as authority on the proposition that if a devise be made to husband and wife they take as tenants in common, and not as joint-tenants, in *Penn v. Coz*, 16 Ohio, 30. In *Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio, St. 172, it was relied upon as sustaining the assertion that the common law

had no force in Ohio except so far as it illustrates and explains the rules of right and justice as applicable to the circumstances and institutions of the people of the state. In *Tabler v. Wiseman*, 2 Ohio St. 207, and in *Thompson v. Dingman's Devisees*, 4 West. Law. Monthly, 640, its authority was relied upon as showing that in Ohio a technical joint-tenancy with its common-law incidents does not exist.

The doctrine of survivorship in joint-tenancy was, at an early day, ignored in Connecticut: See *Phelps v. Jepson*, 1 Am. Dec. 83, and note. In *Hannan v. Towers*, 5 Id. 427, it was held that a grant of a life-estate to J. T. and E., his wife, vested in them a joint-estate with the right of survivorship in E. T., the survivor.

LESSEE OF WALSH v. RINGER.

[2 OHIO, 327.]

DEFENDANT ARRESTED UNDER EXECUTION for a fine may surrender land, and thereby obtain his discharge.

LAND SURRENDERED by defendant in discharge of his body in execution for a fine, may be sold without valuation.

DESCRIPTION.—"Seventy acres of land being and lying in south-west corner of the south-west quarter of section fourteen," is sufficient as a description. The lands will be located in a square.

EJECTMENT. From supreme court of Harrison county upon a case agreed. Both parties claimed title through Ward. Ward owned seventy acres of land situate on the west side of the south-west quarter of section four, township twelve, range five, beginning at the south-west corner of the section, and lying in an oblong shape, extending north one hundred and sixty perches, and east seventy perches, from the south-west corner. The title of plaintiff's lessor was founded upon a sheriff's sale. Ward was convicted of assault and battery in 1820, and an execution issued against his property and body for the fine and costs in 1821, upon which the sheriff took him into custody. To obtain his discharge, Ward surrendered to the sheriff land described in the return as "seventy acres of land, it being and lying in the south-west corner of the south-west quarter of section fourteen, township twelve, range five, of the lands sold at Steubenville." After a succession of writs it was finally sold in 1824, without valuation to the lessor of the plaintiff. The sale was approved by the court, and the sheriff made a deed to the lessor of the plaintiff, in which the description of the land conforms exactly to the levy.

Defendant claimed under a deed from Ward for seventy acres of land described by metes and bounds exactly including the land owned by Ward, dated after the surrender of the same land to the sheriff.

Beebe, for the defendant, objected to the title of the plaintiff's lessor: 1. The body of Ward having been taken in execution, land could not be given up in discharge of it; 2. The sheriff could not sell the land without valuation; 3. The land is not described in the levy and deed sufficiently to pass the title.

Goodenow, for the plaintiff, contended that the execution was issued against the lands as well as the body of Ward. On the third point made by defendant's counsel he cited and reviewed the following authorities: *Frier v. Jackson*, 8 Johns. 495; *Blaque v. Gold*, Cro. Car. 447, 473; *Jackson v. Clark*, 7 Johns. 217; *Lambre v. Redstone*, 5 Taun. 207; *Jackson v. Gardner*, 8 Johns. 397.

By COURT. We entertain no doubt but that upon an execution in a case like that against Ward, the defendant, if arrested, may surrender land to the sheriff, in discharge of his body. This surrender the sheriff may accept, and when accepted, the effect of the proceeding is the same as that of a levy. It is a legal appropriation of the land to satisfy the execution. No subsequent disposition of it by the defendant can pass a title so as to defeat and divest the interest attached by the execution and the proceeding on it. We think, too, that judgments for pecuniary fines are debts due the state within the meaning of the law, authorizing in such cases, a sale of lands without valuation, and that lands surrendered to obtain a discharge of the body seized in execution are to be sold in the same manner as if levied upon by the sheriff in the first instance.

The description of the lands is in general terms; seventy acres being and lying in the south-west corner. The defendant contends that this description is so vague and uncertain as for that reason to be void and inoperative. On the other hand the plaintiff contends it is a good description to convey seventy acres of land, commencing in the south-west corner and extending on the west line to the north-west corner, in an oblong square. Neither of these constructions can be maintained. The general position of the land conveyed is given with sufficient certainty. It is in the south-west corner. According to the rules of decision, both in this state and in Kentucky that corner is a base point from which two sides of the land conveyed shall extend an equal distance, so as to include by parallel lines the quantity conveyed. From this point the section lines extend north and east so as to fix the boundary west and south, the east and north boundaries only are to be established by con-

struction, and the rule referred to gives them with sufficient certainty.

It is argued for the lessor of the plaintiff that the court performing in this case the functions of a jury are to decide, not only the construction of the deed, but the intention of the parties. Where there is no ambiguity in the description, the construction of the terms employed is matter of law, independent of the intention of the parties. And here upon legal principles there is no ambiguity. Had the description been "seventy acres on the west side of the quarter" the whole west line must have been considered the base line of the tract, and the quantity laid out in an oblong square. It would have been a violation of the plain legal sense of the terms used to lay out the land in a square at either corner, upon parol proof that such was the intention of the parties. So in this case, no proof can justify us in giving an interpretation by which terms that locate the land in a square at the south-west corner, shall be made to locate it on the west side. The plaintiff must have judgment for so much of the land in dispute as may be included by a line north from the south-west corner, such a distance that the parallel line of a square with four equal sides, will include seventy acres.

The principal case is followed in *Cunningham's Lessee v. Harper, Wright*, 366, and in *Hay's Lessee v. Storrs*, Id. 711, as showing that a certain number of acres in the corner of a tract means that number of acres in such corner in the form of a square.

TIERNAN v. BEAM.

[2 Ohio, 383.]

A VENDOR HAS A LIEN on the premises sold for the purchase-money, and his lien is not affected by making a conveyance and taking a note or bond, with personal security for the balance due.

EXISTENCE OF VENDOR'S LIEN IS PRESUMED until the contrary appears.

VENDOR'S LIEN is not discharged by the death of the vendor, and the consequent transfer of the debt to his heir or devisee.

SPECIFIC PERFORMANCE.—In an entire contract for the sale of five tracts of land, and a separate bond given for the conveyance of two, the purchaser can not have specific performance without performing, on his part, the entire contract.

WANT OF POWER TO CONVEY can not be supplied in chancery. Hence, if executors convey without power, their conveyance can not be aided in equity.

CAUSE reserved for decision by supreme court sitting in Richland county. The opinion states the case.

J. C. Wright, for complainant.

Wm. Stanbury, for respondents.

By Court, **BURNER, J.** There is some contradiction in the testimony, and some inconsistency in the statements of a part of the witnesses, but the leading facts on which the case must depend are sufficiently ascertained. The bill, answers and exhibits show that in 1811, Newman sold to the defendant, Beam, five quarter sections of land, containing eight hundred acres, at four dollars and fifty cents per acre, amounting to four thousand four hundred dollars. For two of these quarter sections Newman had obtained a patent. The remaining three had not been paid for in full to the government, and consequently were held by certificates of purchase. Beam was to complete the payments, and to enable him to do so the certificates were assigned. The legal title of the two quarters remained in Newman, who gave a title bond in the penal sum of seven hundred and fifty dollars, with a condition to convey them on the payment of that sum. One thousand two hundred dollars of the purchase-money was paid in hand; notes, or sealed bills, with the defendant, Hedges, as security, were given for the residue, payable by installments. Newman, the vendor, died in 1813, having devised the notes to his widow, one of the defendants in this suit. Payments were made by Beam to Newman in his life, and to his widow since his death, by which the debt has been reduced to one thousand one hundred and sixty-seven dollars and seventy-six cents. After the death of Newman, his executors obtained a general order of court to execute deeds. The order is admitted by both parties to have been illegal and void. The executors, however, executed a deed to Beam for the two quarter sections in question, on the supposed validity of that order. The complainant obtained a judgment against Beam, in August, 1817, in Belmont county, on which there is a balance of one thousand two hundred dollars due. Execution on this judgment had been sent to Richland county, and levied on the two quarter sections not conveyed, there being, as it is alleged, no other property on which the money can be made. The object of the bill is to subject the two quarter sections to sale for the satisfaction of the complainant's judgment. The principal matter in dispute is whether the court will require the defendants, or those holding the legal title, to part with it for the benefit of the complainant, before the residue of the purchase-money is paid.

The principal points discussed by the counsel are the following: 1. Had the vendor a lien on the land for the purchase-money? 2. If he had such a lien, has it been lost or relinquished by the subsequent conduct of the parties? 3. Did the payment of the sum of seven hundred and fifty dollars, named in the bond, entitle the purchaser to a deed for the two quarter sections before the whole of the purchase-money due on the contract was paid? 4. Will the court give effect to the deed made to Beam by the executors of Newman, agreeably to the prayer of the bill?

On the first point, the authorities clearly show that a vendor has a lien on the premises sold for the purchase-money, and that his lien is not affected by conveying the premises, and taking a note or bond, with personal security for the money. It exists in every case of a sale where the money is not paid, unless it be otherwise agreed by the parties, either expressly or by such arrangements as clearly show their intention, and it is incumbent on the party contesting the lien to show that it has been relinquished: *Trimmer v. Bayne*, 9 Ves. 209; 1 Johns. Ch. 308; 2 Ves. 622; 3 Eq. Cas. Abb. 682 (n.); 1 Vern. 267; 3 Atk. 272; 6 Ves. 752; 3 Bibb, 183; 2 Wash. 142; 1 Bro. Ch. 301. In Pennsylvania and in South Carolina, the right of the vendor to this equitable lien seems not to have been recognized, but it has been admitted and enforced in most of the state courts, and in this court as often as the question has been presented: *Jackman v. Hallock*, 1 Ohio, 318 [13 Am. Dec. 627] As between vendor and vendee, the rule is not questioned by the counsel on either side. But on the part of the complainant it is strenuously contended that it does not exist in favor of these defendants; and a variety of circumstances have been referred to for the purpose of taking the case out of the rule. As, for example, that the vendor took obligations, with personal security for the purchase-money, and that those obligations were payable by yearly installments. The first part of this objection has been disposed of already, and it is not easy to discover why the fact that the money was payable by installments should change the rights of the parties. That circumstance can not affect the contract or the consequences resulting from it. As to everything connected with this question, it is immaterial whether the money be payable in a gross sum, or by installments on different days. It was also urged that because the legal title was retained by the vendor for a time and afterwards conveyed with the assent of the devisee, we must draw the conclusion that

the parties did not intend to have a lien reserved. To rebut the inference drawn from this circumstance, it is only necessary to state that the retaining of the title by Newman till the time of his death, evidences a determination on his part to hold the land as his security; and that as the executors were not privy to the contract, and were ignorant of the intention and understanding of the parties at the time it was made, their attempt to convey the land after the death of Newman can not have any bearing on the question. We can not draw from it an inference inconsistent with the manifest design of the vendor. But this question does not rest on this inference alone. The testimony of Pearce proves that it was a part of the contract that Newman should hold the land as security for the money. Such proof, however, was not necessary on the part of the defendants. The existence of the lien must be presumed until the contrary appears. It rests with the complainant to show that the vendor did not rely on it.

The second inquiry is, has the lien been lost by anything that has taken place since the contract was made. The complainant contends that if the lien did exist in the life of Newman, it ceased at his death, and that the devisee can not claim it, because, by the devise, the debt has been separated from the land. The case of *Jackman v. Hallock*, 1 Ohio, 318, has been cited to sustain this position. That was a claim set up by the assignee of a note, in the life of the vendor. It was a transaction between the living. A majority of the court were of opinion that the lien did not pass by the assignment. But the circumstances of the two cases are materially different, and the decision in that case does not necessarily conclude this. The force of the argument used on that occasion seems to be that the vendor may separate the equitable lien from the legal right, that he may assign the latter, but can not pass the former because it is given for his own exclusive benefit. Adopting this reasoning as conclusive, it admits that while he retains the legal right the equity will attach to it; and upon that principle, if he retain them united till his death, they must both descend to his heir, or pass to his devisee, because the act of God shall not injure any man. The death of a vendor can not impair his rights. They must pass to his representatives in the condition in which they were at his death. If the debt in the hands of Newman, during his life was an equitable lien on the land, it must continue so in the hands of the heir or devisee, for at his death all his legal and equitable rights pass by operation of

law, in the same state in which he held them. No good reason can be assigned why any of them should be forfeited by an act of Providence, not under his control. The duration of an estate may be limited by the term of the grant to the life of the grantee. But such a limitation was not contemplated by the parties in this case. The rights mutually acquired were intended to survive.

There was nothing in the nature or terms of the agreement inconsistent with such an incident, and I do not see by what rule of construction a limitation can be applied to the equitable that does not equally affect the legal right. The security for the debt should be as permanent as the debt itself. They ought to exist and expire together. The object of the one was to insure the enjoyment of the other, and if either is to be forfeited by the death of a party, I am at a loss to determine which it should be. The lien of a vendor is not founded on arbitrary principles that require a rigid construction. It is not of such a nature as should induce a court to lay violent hands on it whenever a plausible pretext can be found for doing so. It is founded on principles of justice, and ought, therefore, to be protected. It originated in the care which the law has for the preservation of equitable rights. It was intended to prevent one man from enjoying the property of another without consideration, and it therefore applies as well to the representative of a deceased vendor as to the vendor himself. It is in the nature of a mortgage, provided by the benignity of the law, for those who may have been too confiding; and, in my estimation, our legal system would be imperfect without it. The great object of every code of laws is to prevent injustice, and the more effectually that end is accomplished the nearer does it approach to perfection. Justice certainly requires that real property sold on contract should be answerable for its price, as far as is consistent with the safety of third persons. Hence legal mortgages have been resorted to, and the doctrine of equitable liens has been established; and as these securities are similar in their operation, and have originated from the same policy, they ought to be equally favored. In *Martin v. Mowlen*, 2 Burr. 979, and *Green v. Hart*, 1 Johns. 590, mortgages are treated as chattel interests which may be discharged by parol, not being within the statute of frauds.

This would show that there is no essential difference between legal and equitable mortgages as to the solemnity required in their discharge. They both originate in contract, the one by

express stipulation, the other by operation of law. From this view of the subject it seems to be a just conclusion that the death of Newman did not extinguish his lien on the land in question, and that the right survived for the benefit of those to whom it legally belongs. As the death of Newman and the attempt to convey by his executors are the only circumstances which have taken place since the contract was made, calculated, in the opinion of counsel, to destroy the lien, and as neither of these is sufficient for that purpose, the conclusion follows, that if the lien ever existed it continues to exist. But before this point is dismissed I will notice some of the authorities cited by counsel as having a bearing on it. Much importance is attached to *Pollexfen v. Moore*, 3 Atk. 272. The defendants rely on it to establish the lien, and the complainant quotes it to show that the lien expired at the death of the vendor. It has often been remarked that the report of that case was very obscure, and the master of the rolls in *Trimmer v. Bayne*, 9 Ves. 210, affirms that Lord Hardwicke destroys his own dictum, that "the equity will not extend to a third person," by the decree which he makes in the same case. The object of the cross-bill was to protect a legacy given out of the personal estate, either by requiring the complainant in the principal bill, who was a vendor, seeking for his purchase-money, to resort to his equitable lien, or otherwise, if he were allowed to exhaust the personal estate to the prejudice of the legatee, that she might succeed to his equitable right; and in the face of his own dictum, the chancellor marshaled the assets so as to give her all the relief she was entitled to. He established the equitable lien and confined the vendor to that fund, by which the personal estate was so far preserved for the legatees. In other words, he decided that the land, after it had descended to the heir of the purchaser, should be bound for the purchase-money for the benefit of a person not a party to the contract; and not only so, but that the vendor should resort to that lien and exhaust the fund in the first instance. The object of the cross-bill was, therefore, gained, and the equitable lien enforced for the benefit and at the instance of a third person.

So far as the principle really settled in that case has a bearing on the dictum of the chancellor, it appears to condemn it and to favor the conclusion, that it has been introduced by the carelessness or misapprehension of the reporter. It appears, however, to be the foundation of the doctrine now contended for, and to have led to all the controversy on the subject which is

found in the subsequent cases. But the object I had principally in view in turning to that case was to distinguish from the case before us by showing that these defendants can not be treated as third persons in the sense in which the chancellor used the phrase. Mrs. Moore, whom Lord Hardwicke denominated a third person, was not concerned in the sale or purchase of the land; she had no interest, either original or derivative, in the purchase-money. Her claim had no connection with the debt created by the purchaser, or with the lien which the law created for its security. She was, in the literal sense of the words, as to that transaction, a third person, a stranger, seeking to protect a legacy that had no relation to the sale of the land, and in which the vendor never had an interest. Her prayer was, if the vendor did not avail himself of the lien, that the court would place her in his shoes, and transfer to her his equitable right. A simple statement of the case shows that it is not analogous. Mrs. Newman, in this sense, is not a third person; she can not be called a stranger to the transaction; she has succeeded to the rights of her husband, resulting from that contract; she stands in the shoes of the vendor, and, as the legal owner of the debt, claims the benefit of the security attached to it. She is the only party in interest. The lien can not operate in favor of any other person; she does not attempt to meddle with the rights of others, and can not, therefore, be denominated a third person.

That case ought not to be carried further than its terms necessarily require. Subsequent cases should not be brought within its influence by remote analogy. Mortgages are considered as inseparable from the debts to which they relate. They follow them as the shadow follows the substance, so that any act amounting to a legal transfer of the debt will carry with it the mortgage. In *Martin v. Mowlen*, 2 Burr. 973, Lord Mansfield states it as a settled rule, that a mortgage, being a charge on the land, whatever will give the money, will convey the estate in the land along with it, to every purpose. If the debt be assigned, devised or discharged, without naming the mortgage, the mortgage will share the fate of the debt. The right in it passes by operation of law rather than by the act of the party: *Green v. Hart*, 1 Johns. 580, adopts the same principle. The dictum of Lord Hardwicke, as it is expounded by the complainant, would be inconsistent with the doctrine maintained in these and other cases of similar import. But it appears to me that it can not be applied to a person who has acquired an interest in the debt; and with that limitation, it has no unfavor-

able bearing on the claim of the defendant, nor does it conflict with the cases just cited.

It must be recollected, however, that the matter directly in contest between these parties is the two quarter sections not conveyed by Newman in his life. The three quarters which were conveyed have been disposed of. As to these quarters, the defendants certainly stand on higher ground. They have the legal title, against which the complainant is setting up an equity, and the question is, whether the court will deprive them of that title, and if they will, upon what terms. In deciding this question it is necessary to consider on what ground the complainant stands. He had no concern in the contract, and as a party he has no interest in it. He is pursuing the rights of Beam in the character of a creditor, and any circumstances of hardship in his own case are not to be considered here. He stands in the shoes of Beam, and the case must be decided as though Beam were the complainant praying for a specific execution of his contract. Viewed in this light, the complainant must do equity before he can expect to receive it. Whatever might have been the understanding of the parties, we find the defendants with the law on their side, and with an equity at least as strong as that of the complainant. The purchaser is insolvent, and the defendants must lose the purchase-money if they are compelled to give up the title, which is the only plank on which their hopes can rest. I do not know on what principle Beam can extort it from them before he has complied with his part of the contract. It certainly was not the intention, or expectation of those concerned, that he should have the land without paying for it. If the title had remained in the vendor by mere accident, I could not hesitate to say that equity ought not to take it from him till the contract is fulfilled. But in this case there is both positive and presumptive evidence that Newman relied on the title, and retained it as his security.

The third inquiry is, did the payment of seven hundred and fifty dollars, the sum named in the title bond, entitle the purchaser to a deed for the two quarters before the whole of the purchase-money due on the contract was paid. The counsel for the complainant have treated the case as though there were two contracts, one relating to the three quarters conveyed, and the other to the two quarters not conveyed, and on that ground they claim a right to the two quarters, because, they allege, the purchase-money for them has been paid in full; but they have certainly taken an incorrect view of the subject; for, in the first

place, there is not anything that indicates two contracts, and in the second place, the most rational conclusion, as to the payments, is that they were not made with reference to one portion of the land more than another. The defendants allege positively in their answers, that the five quarter sections were sold in a body, at the average price of five dollars and fifty cents per acre, amounting to four thousand four hundred dollars. Henry Bell, Michael Newman and Michael Beam, jun., testify to the same fact. They prove that the land was sold in a lump at an average price, and by a single contract. The testimony of Pearce amounts to the same thing. He heard the parties speak of the transactions as one contract, and understood from them that the land was bound. In addition to this, the nature of the transaction and the circumstances attending it, show clearly that there were not two contracts. There was a great difference in the value of the quarters, both as to quality of soil and improvements. Some of them were entirely unimproved, a part of them were improved to a considerable extent, and yet they were sold at an average price. This could not have been the case if they had been purchased separately. The sum of one thousand two hundred dollars, paid in hand, was deducted from the amount of the five quarters, and notes with security were given for the residue, without distinguishing for what particular portions of the land they were given, and all the quarters were purchased at one and the same time.

From these circumstances, independent of the testimony, the inference is irresistible that the five quarters were purchased by one and the same contract. The execution of the title bond is no evidence of two contracts. It was the natural consequence of the difference in the situation of the title. As there was money due to the United States on three of the tracts, which was to be paid by the purchaser, it was necessary to assign him the certificates for those tracts, to enable him to complete the payment, and as the vendor was to retain the title of the two, for which patents had been obtained, it was natural to give a title bond, and as it was the understanding of the parties, that all the land was to be bound for the purchase-money, and as obligations had been given for the whole amount, the sum named in the title bond was most probably accidental. There is no rule of calculation suggested by the case, from which it can be ascertained that seven hundred and fifty dollars was due on the two quarters. At the average price they amounted to one thousand seven hundred and sixty dollars. If the whole pay-

ment of one thousand two hundred dollars be deducted from them, the sum due would be five hundred and sixty dollars. If a proportionate part be deducted, the sum due would be one thousand two hundred and eighty dollars. The admission so much relied on that seven hundred and fifty dollars had been paid amounts to nothing, for it appears from the testimony of Mr. Parker, that at the time those declarations were made, the payments amounted to more than three times that sum, as the original debt had been reduced to one thousand one hundred and sixty-seven dollars; but there is not the slightest reason to suppose that any part of this money was paid with special reference to these quarters. Counsel have labored to give the case that aspect, but without success. The facts do not sustain it.

The fourth and last inquiry is, will the court give effect to the deed executed by the executors? Chancery may aid a deed rendered inoperative by accident or mistake, when the grantor had power to convey, and intended to do so, but it can not generally supply a want of power. It can not give effect to deeds executed by persons who have neither title nor authority to convey from those who have the title. The deed from the executors of Newman to Beam was unauthorized and illegal. Its operation was not prevented by a defect in the form, or in the execution of it, but by a total want of power to convey, which no court of equity can supply. A decree may remedy a mistake in a conveyance by a person having power to convey, but it can not create a power. The former is often done when the rights of third persons are not affected, or when equity would, in the first instance, have decreed a conveyance. But in this case, the executors attempted to convey without authority, and if their deed had taken effect, it would have been injurious to third persons. The statute has pointed out the only method by which executors or administrators can obtain power to sell real estate, or to execute contracts for the sale of it, made by their testators or intestates. It is necessary to pursue that course, in order to obtain the power, and an attempt to convey before they have done so, must be wholly inoperative. The power must be obtained from the common pleas, and it would not be more irregular for this court to grant the power in the first instance than to remedy a want of it after a fruitless attempt had been made to execute it; and besides, when application is made to the common pleas for an order to execute a contract, it is their duty to see that the contract has been fairly made, and fully complied with on the part of the purchaser; and if

they should unadvisedly order a conveyance while any portion of the purchase-money was due and unpaid, it would be contrary to the statute, and such a fraud on the heirs or devisees as would justify the interference of this court for their protection. There are two circumstances then which prevent us from giving effect to the deed made by the executors of Newman: 1. They made it without having obtained a power for that purpose from the court of common pleas; 2. As the contract had not been fully complied with on the part of Beam, the common pleas were not authorized to grant the power; and if they had made an order for that purpose, it might have been avoided as a fraud on those who were interested in the contract; so that the question resolves itself into this: Will chancery give effect to a deed made without authority, and under such circumstances as would authorize them, if an authority had been granted, to lay their hands on it as a fraud on third persons?

The complainant seems to rely much on the alleged equity of his case. But if he has an equity it can not aid him, because the defendants have an older and a stronger equity. It does not appear when the debt to Tiernan was contracted, nor is it material to know. His judgment was rendered in 1817. The lien of the defendants has existed since 1811. The equity of the complainant extends only to that portion of interest that would remain in Beam after all prior equities are satisfied. On this principle he is to be postponed to the defendants who hold an older equity. The defendants have also the strongest equity. Newman was the proprietor of the whole property. He was not bound to sell it; and after he had contracted to sell, he was not bound to convey till the consideration-money was paid. Beam had no right to appropriate it to his own use or to the use of his creditors, further than he had made it his own by paying the purchase-money. Were we now to appropriate the proceeds of this land to the satisfaction of the judgment, we should virtually decree the estate of Newman to pay the debts of Beam without a previous liability, and without a consideration; but on the other hand, if the complainant receives what the land is worth, more than the residue of the purchase-money due on the contract, he will obtain all the right of his debtor, beyond which he has no equitable claim. The complainant's counsel, to strengthen himself on this point, urged very earnestly that Beam had treated the land as his own; that it was reputed to be his; that it gave him credit; and that the world was thereby deceived.

In a contest about personal property, as to which possession is *prima facie* evidence of right, such facts as these are entitled to weight and are sometimes decisive of the matter in controversy, but the occupancy of land is not considered as an evidence of title. No prudent man would rely on such circumstances, but would rather resort to the records, where the truth may be ascertained, and if he omit this precaution, the consequences are chargeable to himself. But the argument drawn from this source is wholly gratuitous, because there is no evidence to show that Tiernan knew of such facts, or relied on them, when he gave credit to Beam. If the legal title had been conveyed to Beam, and the defendants were resting entirely on their equitable lien, there might be some plausibility in recurring to these circumstances; but the fact is not so, the legal title has not been conveyed, the defendants were not bound to vigilance, they had the same right to rely on their title as a legal mortgagee has, and the same right to reply to the complainant, *caveat emptor*. It is readily admitted that facts of this description sustain the exception to the general rule made in favor of subsequent purchasers, for a valuable consideration, without notice, as to whom the equitable lien can not be enforced. It was also urged that Hedges considered the deed from the executors as valid, and supposed that he had no right to rely on the land as a fund to pay the purchase-money for which he was bound to Newman. This may be so, but his ignorance does not forfeit his rights.

On the whole, we are satisfied that the sum due to the estate of Newman must first be paid out of the proceeds of the sale, and the residue paid over to the complainant.

This case is approved and explained by the court in *Williams v. Roberts*, 5 Ohio, 35. In *Brush v. Kinsley*, 14 Ohio, 20, it is cited to the point that a vendor's lien is personal and cannot be affected by assignment of a note for the purchase-money. In *Mayham v. Coombs*, 14 Ohio, 428, it was held that the vendor's lien was lost by his taking other security on real property. In *Boos v. Ewing*, 17 Ohio, 500, it was decided, on the authority of the principal case, that a vendor's lien exists in Ohio under certain circumstances. In *Lieby v. Lullow's Heirs*, 4 Ohio, 469, it was held that one who advances money to pay the intestate's debts has not, for that reason, a lien upon the lands of such intestate in the hands of the heir. In *Salmond v. Price*, 13 Ohio, 368; in *Piatt v. St. Clair*, 7 Id. Pt. 2, p. 165; and in *Dickey v. Beatty*, 14 Ohio, St. 389, it is cited as authority to show that, while a court of equity may aid a defective execution of a power when it is given, it cannot supply a want of power. In *Neil v. Kinney*, 11 Ohio St. 53, it is cited with approval to the point that the vendor's lien passes to the devisee of the vendor when the legal title remained in him.

On the subject of vendor's lien in Pennsylvania, see note to *Kaufelt v. Bower*, 10 Am. Dec. 444; as to the point of the mortgagee being affected by vendor's lien, see note to *Duval v. Bibb*, 4 Id. 510. For a full discussion of the subject of vendor's lien, see note to *Lagow v. Badollet*, 12 Id. 262; see also on this subject, *Jackman v. Hallock*, 13 Id. 627, and note 629.

HOUGH'S ADMINISTRATORS v. HUNT.

[2 OHIO, 495.]

RESCINDING CONTRACT IN EQUITY.—If a person deeply in debt, to obtain a loan, agrees to purchase a tract of land at more than double its value, and gives a mortgage upon other property to secure the loan and a part of the purchase-money, the vendor being apprised of the purchaser's necessities, equity will rescind the contract.

BILL in chancery, reserved for decision by the supreme court of Ross county. The bill asks relief against a contract for the purchase of a tract of land by Hough from Hunt, on the ground that advantage had been taken of the necessities of complainant's intestate, and of unfair practices in respect to the contract.

In September, 1818, Hough, being pressed for money to pay a debt due to a bank, applied to Hunt for a loan of about two thousand six hundred dollars. Hunt agreed to loan Hough ten thousand dollars upon condition that the latter would buy of him five hundred and ninety-three acres of land, at twenty dollars per acre. Hough assented to these terms, and received a loan of two thousand six hundred dollars.

Hough gave his three separate notes for the price of the land and the money loaned; one payable on the fifteenth of September, 1819; one on the fifteenth of December, 1819; one on the fifteenth of March, 1820. In November, 1818, Hunt gave Hough a bond to convey the land upon the payment of the two last notes. The first note was secured by a mortgage on a valuable tract of land. Hunt never advanced the balance of the ten thousand dollars, as Hough was not able to give him the security he required. Hough died on September 4, 1819. Judgments were obtained against Hough's administrators on all the notes and also upon the mortgage. Hunt knew of Hough's embarrassments at the time the contract was made, and the land purchased at twenty dollars an acre was proved by several witnesses not to have been worth half that sum. The bill prayed that the contract be canceled and the mortgage discharged by the payment of the two thousand six hundred dollars loaned, with interest.

Grimke, for complainants, maintained:

1. That it is a settled rule of the English court of chancery, that gross inadequacy of price may be sufficient ground for rescinding a contract. He cited and commented upon the following cases: *Day v. Newman*, cited in 10 Ves. 300; *Nott v. Johnson*, 2 Vern. 27; *Wiseman v. Beake*, 2 Id. 121; *Tisleton v. Griffith*, 1 P. Wms. 310; *Baugh v. Price*, 1 Wils. 320; *Gwynne v. Henton*, 1 Br. Ch. Cas. 1; *Gartside v. Sherwood*, 1 Id. 558; *Underhill v. Horwood*, 10 Ves. 211; *Morse v. Royal*, 12 Id. 355; *Pickell v. Loggon*, 14 Id. 214; *Purcell v. McNamara*, Id. 91; *Powell on Con.*, part 2, 158.

2. The purchaser was in distressed circumstances. The principle to be extracted from the cases is that distress renders the party incompetent to act freely, not that it affords proof of imposition; and, therefore, there need be no fraud on the other side. In support of this position he cited: *Berny v. Pill*, 2 Vern. 14; *Heathcote v. Paignon*, 2 Id. 156; *Chesterfield v. Janssen*, 1 Atk. 301.

3. Third persons, and particularly the representatives of the creditors of the deceased, have a better right to impeach the transaction than would the intestate himself.

Brush and Fitzgerald, for respondent, cited and relied upon the authority of *Osgood v. Franklin*, 2 Johns. Ch. 23 [7 Am. Dec. 513]. He claimed that the cases of *Mortlock v. Buller*, 10 Ves. jun. 292, and *Day v. Newman*, cited in *Mortlock v. Buller*, were decisive of this case, being exactly analogous thereto in fact and principle.

By COURT. From the evidence in this case it is manifest that at the time of the contract for the sale of the land in question the vendor knew that the purchaser was in some degree embarrassed. It is also fully proved that the land was not worth half the price that Hough agreed to pay for it. The circumstances of the case are altogether extraordinary. Hough is hard pressed for the sum of two thousand five hundred dollars. He applies to Hunt for a loan of that sum. He obtains it, and an engagement that the lender will loan him seven thousand five hundred dollars more upon good security. But at the same time the two thousand five hundred dollars is borrowed and a contract made for a further loan; a contract of sale is made for a tract of land at eleven thousand nine hundred and seventy-five dollars, being more than double its real value. Two thousand three hundred and twenty-five dollars of which, with the money actu-

ally loaned, is secured upon other property than that sold. The mind revolts at the idea that a man so embarrassed, would, to obtain the loan of two thousand six hundred dollars, voluntarily embarrass himself further by creating a new debt of eleven thousand nine hundred and seventy-five dollars, for property not worth half that sum. It is impossible that the vendor, who also made the loan, was not sensible that he was taking the advantage of the purchaser's necessity. The imprudence of the proceeding on the part of Hough was so gross, that it could justly be attributed to no other cause.

It is not in proof that Hunt knew the extent of Hough's embarrassments. But he knew that he was in necessity to some extent; of that necessity he must have been sensible; he took advantage in exacting the contract for the sale of land. The wish to obtain further loans and the agreement to make them, with the subsequent escape from performing that agreement, are strong circumstances in confirmation of the fact that Hunt knew Hough's situation and acted upon it. One peculiar hardship of the case is, that upon account of this unconscionable contract, Hunt has fastened a part of the purchase-money upon Hough's other lands, sweeping from previous creditors that which their means had supplied, and retaining to himself the whole consideration which his contract was supposed to advance.

The rule in chancery is well established. When a person is incumbered with debts and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve upon account of the advantage and hardship. Where the inadequacy of price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract. So, when a person borrowing money to relieve his necessities, is induced to purchase property at an exorbitant price, and to an amount greatly beyond the loan obtained, and secure the payment by mortgage on his other lands, the necessity of the purchaser, connected with the exorbitancy of price, is sufficient evidence of unfair advantages to justify the interference of the court. We consider this a case of great exorbitancy of price, where the purchaser was deeply embarrassed, and where the vendor availed himself of that embarrassment to exact the bargain. We are, therefore, of opinion that the contract of purchase be rescinded, and that the mortgage remain a lien only for the money loaned and interest.

RESCINDING CONTRACTS IN EQUITY WHERE THERE IS NO ACTUAL FRAUD, ACCIDENT OR MISTAKE.—There is a large class of cases in which courts of equity will rescind contracts, which are against some public policy, where an unconscientious advantage has been taken, by one of the parties, of the condition or circumstances of the other party, where there is gross inadequacy of consideration, or where there has been imposition or oppression practiced upon a person who had reposed confidence in the party who had abused it. The ground on which a court of equity affords relief in such cases is, that while there may not have been any actual fraud practiced by either party to such contract, yet there has been a constructive fraud perpetrated upon the party to the contract who, from any cause, may not have stood upon an equal footing with the person with whom he has contracted. "By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design, or contrivance to perpetrate a positive fraud, or injury, upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law, as within the same reason and mischief, as acts and contracts done *malo animo*." 1 Story's Eq. sec. 258. Lord Chancellor Hardwicke in *Chesterfield v. Janssen*, 2 Ves. sen. 155, presents, in a very able manner, a classification of the various kinds of fraud against which a court of equity will grant relief: "This court has undoubted jurisdiction to relieve against every species of fraud: 1. Then, fraud, which is *malus dolus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case; 2. It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other. * * A third kind of fraud is, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed; but it is wisely established in this court, to prevent taking surreptitious advantage of the weakness or necessity of another; which knowingly to do is equally against conscience, as to take advantage of his ignorance, a person is equally unable to judge for himself in one as the other. A fourth kind of fraud may be collected or inferred in consideration of this court, from the nature and circumstances of the transaction, as being an imposition and deceit on the other persons not parties to the fraudulent agreement. It may sound odd that an agreement may be infected by being a deceit on others not parties; but such there are, against such there has been relief." See, also, *Hall v. Perkins*, 3 Wend. 626. It will be seen from the classification here given, that only in the first kind is there any actual fraud; all the others are examples of constructive fraud. It is seldom that any one of these frauds stands alone in a transaction; there is generally a combination of two or more of them in the same case, and this fact is a very powerful inducement to a court of equity to interfere and grant relief by rescinding the contract.

CONTRACTS RESCINDED FOR GROSS INADEQUACY OF CONSIDERATION.—It is well settled, both in England and in this country, that mere inadequacy of price, or any other inequality in the bargain, is not *per se* a ground of rescission unless the inadequacy is so manifestly gross that a court of equity will infer from that fact alone that there was imposition or oppression in the transaction amounting to evidence of fraud: *Osgood v. Franklin*, 2 Johns. Ch. 1 [7 Am. Dec. 513]; *Coffee v. Ruffin*, 4 Coldw. 487; *Fripp v. Fripp*, 1 Rice Eq. 84; *Wintermute v. Snyder*, 2 Green (N. J.) Ch. 489; *M. R., Ft. S., & G. R. R.*

Co. v. Com. of Miami Co., 12 Kan. 482; *Hardeman v. Burge*, 10 Yerg. 202; *Evans v. Brown*, Wightwick, 109; *Seymour v. Delancey*, 3 Cow. 518, *ante*, 270. In *Jurzain v. Toulmin*, 9 Ala. 662, the court say: "Where, however, the inadequacy is such as to demonstrate some gross imposition or undue influence, or, to use an expressive phrase, shock the conscience and amount, in itself, to conclusive and decisive evidence of fraud, equity ought to interfere. And gross inadequacy of price, when connected with suspicious circumstances or peculiar relations between the parties, affords a vehement presumption of fraud." So in *Gist v. Frazier*, 2 Litt. 118, it was held that an enormous inadequacy of price is a circumstance from which unfairness may be inferred, and, in connection with other circumstances, may authorize the chancellor to vacate a sale, and it was decided in *McKinney v. Pinkard*, 2 Leigh, 149, that inadequacy of price, whether it be so gross as to be *per se* proof of fraud or not, if attended by circumstances evincing unconscientious advantage taken by a vendee of the improvidence and distress of the vendor, will avoid the contract in equity, even though it be executed.

WHERE ADVANTAGE HAS BEEN TAKEN OF THE SITUATION OR CONDITION OF ONE OF THE PARTIES, or where a confidence has been abused, courts of equity will generally grant relief by setting aside the contract. In the case of *Hall v. Perkins*, 3 Wend. 626, it appeared that an ignorant, simple, unsuspecting boy had been induced by his uncle, a shrewd business man of mature age, in whom he had reposed confidence, to accept a conveyance of forty acres of mountain rocks, worth two hundred and forty dollars, in satisfaction of a debt of five hundred and sixty-five dollars, and Savage, C. J., in rendering the decision of the court setting aside the conveyance, says: "Here was a contract made which no sensible man not under delusion would make on the one hand, and which no man who had not lost all consciousness of shame would accept on the other. * * * It is clearly a case, therefore, where, from the nature of the transaction and the situation of the parties, fraud and imposition are to be presumed." And Chancellor Kent says, in *Osgood v. Franklin*, 2 Johns. Ch. 1; 8 C., 14 Johns. 526, 7 Am. Dec. 513: "If, indeed, advantage be taken, on either side, of the ignorance or distress of the other, it affords a new and distinct ground," and in *Darley v. Singleton*, Wightwick's R. 25, it is said: "Notwithstanding the age of the plaintiff (thirty-four years), he was in a situation that is protected by a court of equity; clearly he was distressed:" *Cole v. Gibbons*, 3 P. Wms. 290; *Udall v. Kenney*, 3 Cow. 590; *Clitherall v. Ogilvie*, 1 Desau. 250; *Lester v. Mahan*, 25 Ala. 445. The facts in the case last cited very closely resemble those of the principal case, and the court there held that a suspicion of fraud, coupled with gross inadequacy of price and the pressure of pecuniary embarrassment, is sufficient to induce a court of equity to rescind a contract of sale. So, where one of the parties to the contract was, at the time of making it, greatly in the power of the other, although there was no concealment, and the contract was made after due deliberation and advice of counsel, it was set aside: *Hamilton v. Mohun*, 1 P. Wms. 118. And where a father induced his daughter, who reposed great confidence in him, to make a conveyance to him, although he meant no fraud, the deed was set aside: *Slocum v. Marshall*, 2 Wash. C. C. 397; *Taylor v. Taylor*, 8 How. (U. S.) 183.

In *Kennedy v. Kennedy*, 2 Ala. 571, it was held that where application is made to a court of equity to rescind a contract, the undue exercise of influence resulting from confidence and friendship exerts a great potency in inducing relief: *Williams v. Powell*, 1 Ired. Eq. 460; *Wheeler v. Smith*, 9 How. (U. S.)

55; *Whelan v. Whelan*, 3 Cow. 539. And particularly if the person upon whom such undue influence was exerted was of weak understanding or clouded faculties. In *Harding v. Handy*, 11 Wheat. 103, the court say: "If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is amongst its best settled principles." *McCaw v. Davis*, 2 Ired. Eq. 618; *Hunt v. Moore*, 2 Pa. St. 105; *Conant v. Jackson*, 16 Vt. 335. But mere feebleness of intellect, where it is not so great as to take away the power to contract at all, is not of itself sufficient ground on which to set aside a contract: *Graham v. Castor*, 55 Ind. 559; *Osmond v. Fiteroy*, 3 P. Wms. 129. If, however, advantage is taken of such weakness to extort an unconscionable bargain, equity will interfere, and annul the contract: *Mann v. Betterly*, 21 Vt. 326; *Harris v. Wamsley*, 41 Iowa, 671; *Whipple v. McClure*, 2 Root, 216; *Butler v. Haskell*, 4 Desan. 651.

It was decided in the case of *French v. French*, 8 Ohio, 214, that a contract made in such a state of intoxication as to deprive the party of his discrimination and ordinary judgment, will be set aside in equity, even though the other party had no agency in producing the intoxication. And where advantage is taken of a man in a state of intoxication, and he is induced while in that state to purchase at an exorbitant price, equity will set aside the contract: *Hotchkiss v. Fortson*, 7 Verg. 67; *White v. Cox*, 3 Hayw. 79; *Callosway v. Wüher spoon*, 5 Ired. Eq. 128; *Cruise v. Christopher*, 5 Dana, 181. But if, in such case, the party ratifies the contract after he becomes sober, no relief will be granted him: *Moore v. Reed*, 2 Ired. Eq. 580.

In *George v. Richardson*, Gilmer (Va.), 230, a contract was set aside for inadequacy of consideration and inequality in the condition of the parties, the assignor being a wholly illiterate negro woman living in the family of the assignee. So in *Evans v. Llewellyn*, 2 Bro. Ch. Cas. 150, a conveyance obtained from persons uninformed of their rights was set aside as having been improvidently entered into, although no actual fraud or imposition had been practiced upon them.

RESCISSION OF CONTRACTS MADE WITH HEIRS, REVERSIONERS AND EXPECTANTS IN THE LIFE-TIME OF THE ANCESTOR.—Both in England and in this country, courts of equity have always manifested a strong disposition to interfere, and set aside what are termed catching bargains with heirs and expectants in the life-time of their parents or other ancestors. In *Beane v. Peacock*, 16 Ves. jun. 512, Sir William Grant, M. R., says: "No difficulty could have arisen upon this case if it had not been that of an expectant heir dealing for his expectancy during his father's life. To that class of persons this court seems to have extended a degree of protection approaching nearly to an incapacity to bind themselves by any contract." *Gowland v. De Faria*, 17 Id. 20; *Gwynne v. Heaton*, 1 Bro. Ch. Cas. 1. And Chancellor Kent, in *Osgood v. Franklin*, 2 Johns. Ch. 1, 7 Am. Dec. 513, says: "Dealing with young heirs, and for reversionary interests is, also, watched with the utmost jealousy, and constitutes a particular class of cases forming another exception to the general rule, that for mere inadequacy of price a contract is not to be set aside." In fact the burden of proof seems, in this class of cases, to be cast upon the purchaser to show that he paid a fair and just price. "The relief is granted upon the general principle of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception:" 1 Story's Eq. sec. 336; *Boynton v. Hubbard*, 7 Mass. 112; *Lowry*

v. *Spear*, 7 Bush, 451; 1 Leading Cas. in Eq., part 2, 828; *Davidson v. Little* 22 Pa. St. 245. *A fortiori* will contracts of this kind be set aside, if it appears that an unconscionable bargain has been got from such heir or expectant: *Berry v. Pitts*, 2 Vern. 14; *Twistleton v. Griffith*, 1 P. Wms. 310; *Gwynne v. Heaton*, 1 Bro. Ch. Cas. 1; *Nott v. Hill*, 2 Vern. 27; *Jenkins v. Pye*, 12 Pet. 241. But where such contracts are sanctioned by the ancestor, and upheld by an adequate consideration they will not be set aside: *Fitch v. Fitch*, 8 Pick. 480; *Nimmo v. Davis*, 7 Tex. 26; *Trull v. Eastman*, 3 Metc. (Mass.) 121; *Power's Appeal*, 63 Pa. St. 443.

In considering cases of constructive fraud it is important to bear in mind the fact that in law fraud must be proved and can not be presumed, while the rule is otherwise in equity. There fraud may be presumed, and "it is true, that may be a fraud in equity which is not so at law:" *Trenchard v. Wanley*, 2 P. Wms. 165; *Garth v. Cotton*, 3 Atk. 751; *Lester v. Mahan*, 25 Ala. 445; *Butler v. Haskell*, 4 Desau. 651; *Jackson v. King*, 4 Cow. 207, *ante*, 354.

EFFECT OF RESCISSION.—When a contract is rescinded the effect is to place the parties in interest in the position they occupied previous to the contract, and the party seeking a rescission must restore to the other what he has received under it: *Blake v. Nelson*, 29 La. Ann. 245; *Johnson v. Walker*, 25 Ark. 196; *Buchanan v. Horners*, 12 Ill. 336; *Ellington v. King*, 49 Id. 449; *Jennings v. Gage*, 13 Id. 610; *Tisdale v. Buckmore*, 33 Ma. 461; *Cocke v. Bucks*, 24 Miss. 105; *Utter v. Stuart*, 30 Barb. 20; *Waters v. Lemmon*, 4 Ohio, 229.

DUDLEY v. LITTLE.

[2 OHIO, 504.]

PARTNERSHIP TO PURCHASE AT TAX SALES is against the policy of the law; is a fraud on the owner; and the purchaser can not obtain an available title.

BILL in chancery. The bill stated that the complainants, as heirs at law of Ludlow, were the owners of a tract of land in Delaware county on which the taxes had not been paid. That the collector had sold three hundred and seventy acres of said land, worth three dollars an acre, to the defendant for thirty-three dollars and seventy-three cents. It charged that there was a fraudulent combination by the defendant and others to purchase large tracts of land at the sale for speculative purposes; that they were all to share in the profits of the speculation, and advance their shares of the purchase-money, but that the defendant alone should bid; and that in pursuance of that fraudulent agreement the defendant had bought the land in question and obtained therefor a collector's deed.

J. K. Cory, for complainants.

Pettibone, for defendants, cited: *Steele v. Worthington*, 2 Ohio, 182. •

By Court. A partnership or contract formed for the purchase of lands at a sale for taxes, is against the policy of the law, and if such contract or partnership be entered into for the express purpose of making such purchases, it is a fraud on the owner of the property, and the purchaser can not obtain an available title.

Such combinations have necessarily a direct tendency to prevent competition, which it is the duty of the legislature and the policy of the law to encourage. Over a sale of this description the owner has no control, he can not refuse a bid, or adjourn the sale, or fix a sum below which the property shall not be struck down. The sale is managed by the agent of the state. The owner is not consulted. The highest bidder becomes the purchaser, although the sum bid be less than a hundredth part of the value of the property. This being the case, any combination which has a tendency to reduce the price of the property by preventing competition, must operate as a fraud on the owner. The effects of such combinations can not be controlled by any vigilance on the part of the owner. It frequently happens that large quantities of land are offered for sale on these occasions, in the absence and without the knowledge of the owners; and if such combinations are permitted, all the persons present at the sale might form themselves into companies, and by an agreement not to bid against each other, might purchase in the whole of every tract offered for the amount of tax due on it.

We do not mean to say that partners can not purchase property at a tax sale, for the convenience of the business they are engaged in, when speculation is not their object, but that a partnership or combination can not legally be formed for the purpose of making such purchases. As this was evidently the fact in the case before us, the complainants are entitled to a decree. They must take it, however, on the condition of refunding the purchase-money and interest, with the penalty of fifty per cent. allowed by law, and on the payment of cost.

COMBINATIONS AT TAX SALES.—It is well settled that all combinations of bidders, formed for the express purpose of purchasing lands at tax sales, are against the policy of the law, and a fraud on the owner of the property; and the purchaser, if concerned in them, acquires no title: *Blackwell on Tax Titles*, 397. "All such arrangements are a fraud upon the law, and upon those whose protection is had in view, when a public sale is provided for:" *Cooley on Taxation*, 340; *Kerwer v. Allen*, 31 Iowa, 578; *Brown v. Hogle*, 30 Ill 119; *Slater v. Maxwell*, 6 Wall. 268; *Story's Eq. sec. 293*. In *Slater v. Maxwell*, *supra*, Field, J., cites the principal case with approval; and

both Blackwell and Cooley speak of it with great respect. But if a purchaser bids off property at a tax sale, the fact that a combination existed at such sale to prevent certain lands from being sold to other bidders, but to which he was not a party, and of which he was ignorant, will not vitiate his purchase: *Case v. Dean*, 16 Mich. 12; *Martin v. Cole*, 38 Iowa, 141. And where there is no misconduct on his part at the sale, "there is nothing in reason or law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes:" *Coxe v. Gibson*, 27 Pa. St. 160.

It was held in *Watson v. Phelps*, 40 Iowa, 482, that one who holds under a quitclaim deed from the assignee of a tax certificate, void for combination at the sale, is not entitled to protection as an innocent purchaser.

But the title of a subsequent purchaser, for value, and without notice of the fraud, from one who purchased at a sale void by reason of such combination, will not be defeated thereby: *Van Shaack v. Robbins*, 36 Iowa, 201; *Sibley v. Bullins*, 40 Id. 429.

WHO MAY PURCHASE AT TAX SALE.—See *Blake v. Howe*, *post*.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

DILLER v. ROBERTS.

[13 *EMERANT & RAWLE*, 60.]

HOLDING OVER BY A TENANT.—If a tenant holds over after the first year, the law usually implies an agreement by him to pay the same rent, and at the same time, as before; but no such agreement can be implied where the lease contains many collateral stipulations which could not be performed in the second year.

DISTRESS.—To ENTITLE A LANDLORD to a distress there must be a reservation of a certain rent.

SHERIFF'S RETURN IS CONCLUSIVE in an action between the parties to the suit in which it was made.

ERROR to the common pleas to reverse a judgment recovered against the plaintiff in error, who was defendant below, in an action of replevin. The case is sufficiently stated in the opinion.

Hopkins, for the plaintiff in error.

Buchanan, *contra*.

By Court, **TILGHMAN, C. J.** This is an action of replevin, brought by Isaac Roberts, the plaintiff below, against Adam Diller, the plaintiff in error. The defendant acknowledged the seizure of the plaintiff's goods, and made cognizance, as the bailiff of George Ream, by whose orders he distrained for a year's rent due to the said Ream from the plaintiff. The main point in the cause was whether the landlord had a right to distrain. The evidence was to the following effect: A written agreement, bearing date the twenty-third of March, 1816, was made between Ream and Roberts, by which, in consideration of the sum of forty-seven pounds, to be paid on the first of April, 1816, Ream

let or rented (these are the expressions) to Roberts a certain tavern and lot of ground for one year, from the first of April, 1816. There were several covenants for things to be done by each party, some of which I shall mention hereafter, and for the true performance of the whole, each bound himself to the other in the sum of ninety-four pounds. Roberts entered on the first of April, 1816, paid the sum of forty-seven pounds in advance, and enjoyed the premises until the first of April, 1817. No new agreement was made between the parties, but Roberts remained on the premises, and on the thirtieth of April, 1817, the defendant, by order of Ream, distrained on the plaintiff's goods for the sum of forty-seven pounds, which he claimed as a year's rent in advance, due the first of April, 1817. The president of the court of common pleas charged the jury that the landlord had no right to distrain, and to this opinion the counsel for the defendant excepted. In the argument before us, the counsel have discussed the broad question whether, when rent is reserved, payable in advance, the landlord has a right to distrain immediately on the rent's being due according to the terms of the lease. On this question no opinion will be given, because it did not arise on the evidence in this case. There was no evidence of any agreement for the second year's rent, but it was contended, on the part of the defendant, that, on the plaintiff's holding over after the end of the first year, the law implied an agreement that he should pay the same rent, and at the same time, which he had agreed to pay it the first year. Such, undoubtedly, is the general rule, but the written agreement for the first year in this case was of so singular a nature that I do not think there could be any implication of law that it should extend to the second year. The reason for my opinion that the law did not imply an extension of the written agreement to the second year is, that it contained several collateral matters to be done by each party which could be performed in the first year only. For instance, Roberts was to finish a certain room in the house, then in an unfinished state, for which purpose he was to advance money, which was to be repaid by Ream at the end of the year. Ream was to have a right to keep his horse in the stable until the first of August. Roberts was to keep a public house and obtain and pay for the license for the same. Ream was to have the roof of the stable repaired by the first of June, and put a fence round the lot and garden by the fifth of April. Ream was to give two wagon-loads of his dung, which was then on the premises, to be replaced by Roberts at the end of the

year, and was to take away the rest of his dung by the first of May. All these things indicated a bargain for one year only. In fact, it very much resembled what is called a bargain and sale for a year, though, at the same time, it was, in strictness, a lease.

But, as some of the things which were to be done the first year could not be done the second year, I do not see on what ground the law would imply a contract that the same money should be paid the second year and on the first day of the year. Then, if the law did not imply a contract to pay the exact sum of forty-seven pounds, there could be no distress, even though the jury might think forty-seven pounds a reasonable compensation for one year's enjoyment of the premises. To entitle the landlord to a distress there must be a reservation of a certain rent, of which there was no evidence in this case, but the written agreement before mentioned. I am of opinion, therefore, that the judge was correct in charging the jury that in this case the landlord had not a right to distrain. But, besides the exception to the judge's charge, there were three bills of exceptions to the evidence. Of the two first nothing need be said, as they were abandoned. The third was to the following effect: The sheriff made return on the writ of replevin, "property not delivered and bail entered by the defendant." The defendant offered to prove "that the sheriff has searched for the bond which the plaintiff alleges was given by the defendant and which the return on the writ, by inadvertence and mistake, alleges was taken, and it is not to be found, and that no such bond existed." This evidence was objected to by the plaintiff and rejected by the court. The defendant's offer was, in one word, to prove the return of the sheriff to be false. But this the law will not permit. In the present action, the return of the sheriff cannot be contradicted, although it may be in an action brought against him for a false return. The mistake alleged by the defendant is a very singular one; but if there really was such a mistake, the sheriff should have applied to the court of common pleas for leave to amend, or rather to alter, his return. No doubt the court, on proof of the fact, would have given leave to do so. If the return was false, and the defendant has been injured by it, he has his remedy by action against the sheriff. But I consider the law settled, that the return cannot be contradicted by either party in the action in which it was made. There was no

error, therefore, in the rejection of the evidence. I am of opinion, on the whole, that the judgment should be affirmed.

Judgment affirmed.

THIS CASE IS CITED, to the point that a tenant holding over after the first year is presumed, in the absence of any agreement to the contrary, to hold, subject to the terms and covenants contained in the original lease, so far as they are applicable to his situation, in *Carter v. Collar*, 1 Phila. 339; *Phillips v. Monger*, 4 Whart. 229; and *Hemphill v. Flynn*, 2 Pa. St. 145; but that this presumption may be rebutted by special terms in the lease, in *Abbott v. Shepherd*, 4 Phila. 91; and to the point that a sheriff's return is conclusive between the parties to the suit in which it was made, in *Mentz v. Hamman*, 5 Whart. 154.

DISTRESS FOR RENT.—On this point see the next case and the note thereto. In *Martin's Appeal*, 5 Watts & S. 221, the doubt above expressed by Tilghman, C. J., as to whether, in cases where rent is made payable in advance, the landlord can distrain for it as soon as it becomes due, is confirmed.

LICHTENTHALER v. THOMPSON.

[13 SERGEANT & RAWLE, 157.]

APPROPRIATION OF MONEY.—If the law appropriates money to a person in a particular character, he must receive it in that character, though it injures him to do so, and although the law was designed to benefit him.

DISTRESS can not be made by a landlord after his title has terminated.

SURETY IS DISCHARGED if the creditor, having the means of satisfaction actually or potentially in his hands, refuses to retain it. The same rule applies when the surety apprises the creditor of the means of recovering the debt, and the latter declines to pursue it.

ERROR to the common pleas. The facts were: Kline, the guardian of Lichtenthaler, the plaintiff in this action, had leased certain land to one Miller, for the term of one year from April 1, 1818. On December 31, 1818, Lichtenthaler made a second lease to Miller for a year from April 1, 1819, and Thompson, the defendant here, became surety for the payment of the rent on that lease. In March, 1820, the rent for both years being still unpaid, certain judgment-creditors of Miller levied executions on his goods; and Kline, thereupon, before the sale, delivered a landlord's warrant to the constable requiring him to distrain on Miller for the first year's rent. Thompson, the defendant, then notified Lichtenthaler to apply to the constable and claim the second year's rent out of the proceeds of the sale, but Lichtenthaler declined to do so, and received the first year's rent as agent for Kline. He then brought this action against Thompson for the second year's rent. The landlord's warrant, signed

by Kline, was offered in evidence by the defendant, and admitted against the plaintiff's objection, to which ruling the plaintiff excepted. He also excepted to the charge of the court, which was in favor of the defendant. Verdict and judgment for the defendant, whereupon the plaintiff brought this writ of error.

Alexander, for the plaintiff in error.

Blyth, *contra*.

By Court, GIBSON, J. The particular provisions of the act of the twenty-first of March, 1772, which are applicable to the point before us, are taken from the statute 8 Anne, c. 14, by which it was enacted that landlords might distrain within six months next after the expiration of the lease (a thing that could not be done at the common law), and that goods liable to distress should not be taken in execution, without paying the arrears to the landlord, not exceeding the rent of one year: *Bac. Abr., Rent, K.*, (in note). The object of these provisions was to enable the landlord to give the tenant time not exceeding six months, without incurring the risk of losing his remedy by distress, and this was effected by giving the landlord a lien on the tenant's goods, for at least six months after the expiration of the lease. Under the statute, therefore, it is plain the landlord had priority of right against execution-creditors, only for the rent of the last year. The only difference between the statute and our act of assembly is, that with us the landlord may distrain at any time after the expiration of the lease, provided it be during the continuance of his title; but it can not be supposed that this variance was intended to produce a difference as to the year for which the landlord might claim; in fact, the consequences of the difference were not thought of, and when the legislature provided that the landlord should have the rent of a single year, we cannot but suppose they meant to adopt these provisions of the English statute, in the aspect in which they were viewed by those who had enacted them. Had they intended to produce any difference, it is natural to suppose they would have given the landlord a preference for all the rent due, as he might have distrained for all; but they have not done so. Where the rent is in arrear for a number of years, it will generally make little difference whether the landlord be allowed his preference for one year more than another, as he is entitled for but one in the whole; yet, if the amount of the rent were different, in different years, it would be palpably unreasonable to permit him to elect.

Where the law appropriates money to a person in a particular character, it must be received in that character, although it be an injury to him to receive it so, and although the law intended to benefit him: *Downing v. Kinzinger*, 2 Serg. & R. 326.

But what is decisive in this case is, that Kline, the landlord for the preceding year, had lost the right to distrain. His title as landlord did not continue to the time of the levy, and, consequently, his lien, which was originally intended to guard his right of distress, whilst he chose within a limited time to suspend the exercise of it, was gone. Now, by the custom of this state, the landlord for the current year was entitled to demand the rent up to the time of the levy, although by the terms of the lease no rent was due. It is too late to inquire how a custom so contrary to the evident intention of the act obtained the force of a law; it has finally been established by a decision of this court, and we cannot now question it. The case, then, is just this: The goods of Miller, who is the tenant of Lichtenthaler, under a lease for a year, are seized in execution. Miller, who had been the tenant of Kline under a lease of the same premises for the preceding year, is indebted also to Kline for that year's rent, and Kline lodged a landlord's warrant with the officer who had levied the goods.

Thompson, the surety of Miller, in the lease from Lichtenthaler, gives notice to the latter to claim his preference, and to look to the officer for his rent. This Lichtenthaler refused to do; and, on the contrary, acted as the agent of Kline, and received the rent to Kline's use. His object in doing so is easily discoverable. Kline had been his guardian, and had leased the premises to Miller as such, and as the rent for this year also was ultimately coming to him, he may have thought it advantageous to him to take the rent out of the proceeds of the tenant's goods, for the first year, for the payment of which, Lichtenthaler had not taken the precaution to require a surety in the lease. But as the law appropriated the proceeds of the tenant's goods to the payment of the rent of the current year, he could not substitute Kline's demand for his own, and afterwards resort to the surety of the tenant. The case falls exactly within the principle established by this court in the commonwealth for the use of *Bellas v. Miller*, 8 Serg. & R. 452, that where the creditor has the means of satisfaction either actually or potentially in his hands, and does not choose to retain it, the surety is discharged. Kline was accountable to Lichtenthaler as the guardian of the latter, and if the rent of the preceding

year had been lost by his neglect, would have been chargeable with it in his guardianship account. It was, therefore, a demand which was separate from that of Lichtenthaler, and one which he was not bound to secure. The equity, then, was between Kline and Thompson, the surety of Miller. The former by not distraining whilst he might, has lost his remedy; by which the other had gained an advantage of which we have no right to deprive him; he stands as a surety who apprised the creditors of his having the means of obtaining satisfaction without resorting to his personal responsibility, and as the creditor has thought proper not to apply those means to their proper use, the surety is discharged.

Judgment affirmed.

DISTRESS FOR RENT.—"The distress" says Bacon, "is a remedy given to the lord to recover the rent or services which the tenant hath obliged himself by his feudal contract, to pay by way of retribution for his farm:" *Bac. Abr., Distress*. The origin of this summary remedy is of a very remote antiquity: *Taylor's Land. and Ten. sec. 556*; and it was imported into the English common law from the civil law as a substitute for, and in mitigation of the rigor and severity of feudal forfeitures: *Bac. Abr., Distress; Taylor's Land. and Ten. sec. 556*. Originally a distress was "the taking of the personal chattel of a wrong-doer into the possession of the party aggrieved, as a pledge for the performance of a duty, or the satisfaction of a wrong committed, and the distrainer was bound to hold the pledge in his custody until the pledgor thought proper to redeem it:" *Taylor's Land. & Ten. sec. 557; Comyn's Land. & Ten. 363; Woglam v. Cowperthwaite, 2 Dall. 68*. "But, in modern times, the whole policy of the law respecting distress has been changed, and a distress for rent is now no more than a summary method of seizing and selling the tenant's property, to satisfy the rent which he owes:" *Taylor's Land. & Ten. sec. 557*. A distress is not an ordinary action: *Clark v. Fraley, 3 Blackf. 264; Ahwood v. Mansfield, 33 Ill. 452*. The authority to make it emanates from the landlord, and not from any court or judicial officer, and must be strictly construed: *Clark v. Fraley, 3 Blackf. 264*.

DOCTRINE IN THE UNITED STATES.—The English common law on the subject of distress for rent, together with the various statutes by which it has been modified, exists very generally in the United States; although in many of the states, as in North Carolina and the New England states, the remedy seems never to have obtained a footing, and in others, as in New York, it has been abolished by statute: *2 Washb. Real Prop. 11; Smith's Land. & Ten. (Morris's ed.) 161 n; Taylor's Land. and Ten. sec. 558*. But the prevailing tendency in this country is apparently against the doctrine, as discriminating invidiously in favor of a particular class of creditors, and the states "seem to be gradually abolishing this ancient remedy:" *Taylor's Land and Ten. sec. 556*.

REQUISITES OF A VALID DISTRESS.—Unless there is an express contract reserving a right of distress—a case which it is not now proposed to consider—there are certain requisites which are indispensable to the validity of a distress. These, so far as they concern the relations of the parties and the nature of the contract between them, will be here briefly examined.

ACTUAL DEMISE NECESSARY.—One of the first requisites of a valid distress is that there should be an actual demise or letting of the premises: *Woodfall's Land. and Ten.* 375; *Smith's Land. and Ten.* 188, 189; *Comyn's Land. and Ten.* 366; *Taylor's Land. and Ten.* secs. 561, 563; *Dunk v. Hunter*, 5 Barn. & Ald. 322; *Hancock v. Austin*, 14 Com. B. (N. S.) 634; *Watson v. Waud*, 8 Exch. 335. A mere agreement for a lease will not suffice: *Dunk v. Hunter*, 5 Barn. & Ald. 322. Nor will a mere possession in contemplation of a lease: *Smith & Soden's Land. & Ten.* 185; *Hegan v. Johnson*, 2 Taun. 148. So, if the lessor refuses to give possession under the lease and the lessee afterwards enters under a new parol agreement, there is no right of distress under the original lease: *Spencer v. Burton*, 5 Blackf. 57. But where one enters under an agreement for a lease and afterwards admits charges for rent in accounts rendered by the lessor, it will be construed a tenancy from year to year and will support a distress: *Cox v. Bent*, 5 Bing. 185. So, generally continued occupation and payment of rent under an agreement for a lease which is never executed will constitute a tenancy from year to year such as will authorize a distress: *Comyn's Land. and Ten.* 367; *Mann v. Lovejoy*, Ry. & M. 355; *Knight v. Benett*, 3 Bing. 361. So, where one enters and occupies the premises under a parol lease for four years, which is void by the statute of frauds, such agreement may nevertheless be given in evidence to prove a tenancy from year to year and thus to support a distress: *Edwards v. Clemons*, 24 Wend. 480; *Schuyler v. Leggett*, 2 Cow. 660; *People v. Rickert*, 8 Id. 226; *Prindle v. Anderson*, 19 Wend. 391.

THE RENT MUST BE CERTAIN, or capable of being made certain, by calculation, and must be payable at a time certain, in order to give a right of distress, whether such rent consist of money, or of services, produce, etc.: *Taylor's Land. and Ten.*, sec. 561; *Fawcett's Land. and Ten.* 131; *Co. Lit.* 96 a.; *Daniel v. Gracie*, 6 Q. B. (Ad. & El. N. S.) 145; *S. C.*, 13 L. J. Q. B. 309; *Regnart v. Porter*, 7 Bing. 451; *Dunk v. Hunter*, 5 Barn. & Ald. 322; *Jacks v. Smith*, 1 Bay, 315; *Grier v. Cowan*, Addison, 347; *Wells v. Hornish*, 3 Pa. 30; *Valentine v. Jackson*, 9 Wend. 302. But where the rent is certain in amount the fact that it is made payable in repairs on the premises will not take away the right of the landlord to distrain: *Smith v. Colson*, 10 Johns. 91; *Smith v. Fyler*, 2 Hill, 648. Nor is the right to distrain taken away where a certain rent is reserved, but it is provided in the contract that it will not be exacted if the tenant will pay a certain other debt in lieu thereof: *Reeves v. McKenzie*, 1 Bailey (S. C.), 497. Rent in specific articles is distrainable: *Owens v. Conner*, 1 Bibb, 605; *Rosenstein v. Forester*, 57 Ga. 94; but it was held in *Owens v. Conner*, 1 Bibb, 605, that the landlord, in such a case, could not sell the property taken as a distress. In *Clark v. Fraley*, 3 Blackf. 264, it was decided that where a tenant contracted to deliver for the rent of the premises one third of the corn raised thereon, there was no right of distress because the rent was not certain; but this is in apparent conflict with *Fry v. Jones*, 2 Rawle, 11, where it was held that a distress would lie for one third of the toll reserved as the rent of a grist mill, on the ground that the amount could be made certain by calculation if the tenant kept an account of the toll taken, as it was his duty to do. If the landlord, by a prior lease, has deprived the lessee of part of the premises, the rent for the residue being uncertain, the landlord cannot apportion it and distrain therefor, but his remedy is by action: *Lawrence v. French*, 25 Wend. 443. And as it is only for rent that distress lies and not for damages, there can be no distress for interest on the rent, for this is in the nature of damages for the delay of payment: *Lansing v. Rattoone*, 6 Johns. 43. It is not necessary that the rent should be named in the contract

as rent, if it is rent in fact: *Price v. Limehouse*, 4 McCord, 544, correcting a dictum in *Marshall v. Giles*, 2 Const. Rep. (Tread. ed.) 637.

THERE MUST BE A REVERSION in the landlord in order to give a right of distress. Hence, where the whole interest is demised, no distress will lie: *Preece v. Corrie*, 5 Bing. 24. Therefore, although a tenant from year to year may sub-let from year to year, and will have a right to distrain: *Curtis v. Wheeler*, Mood. & Malk. 493, since he has, theoretically at least, a reversion in the premises, yet if a lessee for years lets the premises for the whole term he cannot distrain: Bac. Abr., Distress (A.); *Parmenter v. Webber*, 8 Tann. 593; S. C., 2 Moore, 656. So, where a lessee of a house for a year sub-lets a part of the house for the entire term, he has no right to distrain, even though before the expiration of the term he takes the house for another year: *Prescott v. De Forest*, 16 Johns. 159. And a lessee for years sub-letting from week to week, cannot distrain after the expiration of his own term, even though the sub-lessee pays the rent for a time under protest: *Burns v. Richardson*, 4 Tann. 720.

THE RELATION OF LANDLORD AND TENANT MUST EXIST to warrant a distress: *Hill v. Stocking*, 6 Hill, 277. This is apparent from what is said above. Therefore, if there is no contract creating that relation between the parties no distress lies; as where A. rents to B., who does not take possession, and C. enters, between whom and A. or B. there is no contract express or implied, A. cannot distrain C.'s goods: *Cohen v. Broughton*, 54 Ga. 296. Hence to defeat a distress, it is admissible to show that the relation of landlord and tenant does not exist because there is no agreement to pay rent: *Farington v. Baley*, 21 Wend. 65.

And this relation must subsist at the time the distress is levied. Hence, if the relation is terminated by a surrender before the distress, the distress will not lie: *Bain v. Clark*, 10 Johns. 424; otherwise, where the surrender is made after the distress: *Nichols v. Dusenbury*, 2 N. Y. 283. Where there is a demise for two years at an annual rent, the contract is entire, and if there be a surrender and acceptance before the expiration of the second year, the landlord having destroyed his right to recover rent for the entire year, can not claim *pro rata*: *Greider's Appeal*, 5 Pa. St. 422, 427, citing the principal case. But where there is a surrender as to part only, the right of distress remains as to the residue: *Peters v. Newkirk*, 6 Cow. 103. Where the lessor elects to treat the tenant as a trespasser, or exercises an option to regard the lessee as void, for a breach of covenant by the lessee, the relation of landlord and tenant is severed, and the right to distrain is gone: *Smith & Soden's Land. & Ten.* 185; *Woodfall's Land. & Ten.* 382; *Bridges v. Smyth*, 5 Bing. 410; S. C., 2 Moore & P. 740; *Jones v. Carter*, 15 Mees. & Wels. 718; *Franklin v. Carter*, 1 Com. B. 750; S. C., 3 D. & L. 213; *Jackson v. Sheldon*, 5 Cow. 448. So, where the tenant is evicted by a paramount title, and continues in possession under a new agreement with the evictor: *Hopcraft v. Keys*, 9 Bing. 613; *Woodfall's Land. & Ten.* 382.

In accordance with what is here laid down, the rule was at common law, that the lessor could distrain only during the continuance of the lessee's term, and that the right of distress was gone after the term was ended, even though the lessee held over: Bac. Abr., Distress (A.); Comyn's Land. and Ten. 376. This was, however, remedied by the statute of 8 Anne, c. 14, sec. 6, giving the landlord a right to distrain for rent previously due, until six months after the end of the term: Bac. Abr., Distress (A.). To support the distress, therefore, at common law, the landlord must aver and show that the tenancy continued up to the time of the distress: *Williams v. Stiven*, 9 Q. B. (Ad. & El.

N. S.) 14. Of course, where the tenant holds over after a notice to quit, by sufferance merely, without any evidence of a renewal of the tenancy, the relation of landlord and tenant is at an end, and there can be no distress for rent subsequently accruing: *Woodfall's Land. and Ten.* 375; *Jenner v. Clegg*, 2 Moore & R. 213; *Alford v. Vickery*, Car. & Marsh, 280; *Smith & Soden's Land. & Ten.* 185. But where there is no positive determination of the tenancy by a notice to quit or otherwise, if a tenant holds over after the expiration of his lease, it will be an implied renewal of the lease on the same terms, so far as they are applicable to the tenant's situation, and distress will lie for subsequent rent: *Webb v. Shearman*, 3 Hill, 547, S. C., 6 Id. 20; and see, *Diller v. Roberts*, ante, 578, and cases cited in the note thereto. In *Hooker v. Dwinnell* 48 Ga. 442, it was held by Warner, C. J., that a mere tenancy at will, which the tenant may terminate at any time by giving one month's notice, is not subject to a right of distress.

POWER OF DISTRESS IN CERTAIN CASES.—Joint-tenants and co-parceners, since their title is one, may severally distrain for the rent of the whole land, though, of course, there can be but one distress for the same rent: *Smith & Soden's Land. and Ten.* 185; *Comyn's Land. and Ten.* 368; *Robinson v. Hofman*, 4 Bing. 562; *Leigh v. Shepherd*, 2 Brod. & B. 465. But a tenant in common can only distrain for his own share of the rent: *Comyn's Land. & Ten.* 368; *DeCoursey v. Guarantee etc. Co.*, 81 Pa. St. 217. A husband may distrain for rent for the wife's land; a mortgagee may distrain upon the mortgagor if the relation of landlord and tenant has been created between them; and generally where that relation actually exists, and there is a reservation of a fixed and certain rent payable at a certain time, together with a reversion in the landlord, such landlord has power to distrain for the rent when due, whatever may be the nature or duration of his estate: *Smith & Soden's Land and Ten.* 185, 188; *Woodfall's Land. and Ten.* 380, *et seq.* In *Keaton v. Tift*, 56 Ga. 446, it was held that an assignee of a right to let certain premises and collect the rent, had power to distrain for such rent.

EXTINGUISHMENT OF RIGHT TO DISTRAIN.—As rent issuing out of land is higher security than any simple contract, the power to make that security effective by levying a distress is not waived or lost by taking as collateral security, a promissory note, or bond, or a note and chattel mortgage, or a bond and warrant of attorney, or even by a judgment entered pursuant to such bond and warrant: *Bantleon v. Smith*, 2 Binn. 146; *Snyder v. Kunkleman*, 3 Pa. 487; *Bailey v. Wright*, 3 McCord, 484; *Price v. Limehouse*, 4 Id. 544; *Correll v. Lamb*, 20 Johns. 407; *Chipman v. Martin*, 13 Id. 240; *Bates v. Nellis*, 5 Hill, 651; *Atkins v. Byrnes*, 71 Ill. 326. And it is held in *Davis v. Gyde*, 4 Nev. & Man. 462, that the taking of a note for the rent does not even suspend the power of distress until the note is due. But where a promissory note is taken, not as collateral security, but in absolute payment of the rent, the right to distrain is gone: *Warren v. Forney*, 13 Serg. & R. 52. And a valid tender of the rent takes away the right of distress, even after the distress is levied, so that the landlord cannot proceed thereunder: *Hunter v. Le Conte*, 6 Cow. 728. Reserving a right to re-enter on non-payment of the rent, does not waive the power to distrain: *Smith v. Meanor*, 16 Serg. & R. 375. But a landlord may waive his right of distress by express stipulations in the contract; as, by providing that the tenant shall pay the rent in discharge of certain debts of the lessor, in which case the remedy is by action on the contract: *Ege v. Ege*, 5 Watts, 134, 138, where the principal case is cited. And his power to distrain may be suspended, where, being simply a *mesne* landlord, he contracts not to distrain for any installment of rent, un

til he has produced a receipt for the rent, for the same period from his superior: *Woodfall's Land. and Ten.* 374; *Giles v. Spencer*, 3 Com. B. (N. S.) 244; S. C., 26 L. J. C. P. 237. But a landlord having promised a sub-tenant of his lessee not to distrain upon him so long as he paid his rent to such lessee, is not prevented from distraining upon such sub-tenant by the fact that he has paid the lessee his rent for a certain period, and has made a tender of the amount still due: *Welsh v. Rose*, 6 Bing. 638. A landlord does not lose his right to distrain by the tenant's abandoning the premises, under the Illinois statute: *Hare v. Stegall*, 60 Ill. 380; or, in Georgia, by the fact that the tenant has permitted another to occupy the premises: *Willingham v. Faircloth*, 52 Ga. 126.

NO DISTRESS LIES TILL THE RENT IS DUE.—This is certainly the common law rule: *Comyn's Land. and Ten.* 378; *Bailey v. Wright*, 3 McCord, 484. Hence, as the rent is not fully due until the last moment of the day when it is made payable, the landlord cannot distrain until the next day. A different practice was adopted under the Pennsylvania statute as intimated in the principal case; and, where execution was levied on the goods of the tenant the landlord was permitted to claim his rent up to the time of the levy, provided it did not exceed a year's rent, although such rent was not due under the terms of the lease. This practice arose apparently from the decision in *West v. Sink*, 2 Yeates, 274. The construction of the statute there adopted was afterwards followed on the principle of *stare decisis*. The doubt of its soundness expressed in the principal case is reiterated in other decisions; as in *Prentiss v. Kingsley*, 10 Pa. St. 120, where the opinion of Gibson, J., in *Lichtenthaler v. Thompson*, on this point, is fully approved. The landlord is not, however, under the construction given to this statute, compelled to confine his claim out of the proceeds of an execution, to the rent for the year during which the levy was made where that year has just commenced to run, and the rent for the previous year is due and unpaid: *Parker and Keller's Appeal*, 5 Pa. St. 390, 395, citing the principal case. Where, by the terms of the lease, the rent is made payable in advance, the landlord may distrain as soon as it is fully due, and is not compelled to wait until the expiration of the period covered by such rent: *Williams v. Howard*, 3 Munf. 277; *Peters v. Newkirk*, 6 Cow. 103; *Atkins v. Byrnes*, 71 Ill. 326.

DISTRESS LIES ONLY FOR THE RENT OF LAND, but where certain chattels go with the premises and enhance their rental value, the right to this remedy nevertheless exists. Thus, distress lies for the rent of furnished lodgings: *Newman v. Anderton*, 5 Bos. & P. (2 Bos. & P. N. R.) 224; Bac. Abr., *Distress*, (A). So it was held in *Williams v. Howard*, 3 Munf. 277, that distress would lie for the rent of a plantation with certain slaves, etc., thereon.

DEMAND IS UNNECESSARY, as a general rule, before levying a distress: *Taylor's Land. and Ten.*, sec. 566, and cases cited; *Buffington v. Hilley*, 55 Ga. 655.

SURETY EXONERATED BY CREDITOR GIVING UP SECURITY.—The principle laid down in the foregoing decision, that where a creditor parts with any security or fund which he would be entitled to apply to the discharge of the debt, the surety is exonerated, at least to the extent of the security so given up, is approved in *Geddis v. Hawk*, 1 Watts, 295; *Commonwealth v. Brice*, 22 Pa. St. 214. So, if the creditor neglects to pursue legal means of securing payment, of which he is apprised by the surety: *Richards v. Commonwealth*, 40 Pa. St. 149. But, see on this point, the note to *Cope v. Smith*, 11 Am. Dec. 589.

STEWART v. STOCKER.

[13 BERGEANT & RAWLE, 190.]

EXECUTION PREMATURELY ISSUED on an existing judgment, though erroneous, is not void. It can not be collaterally attacked by another execution-creditor, who sues the sheriff for the proceeds.

SHERIFF NOT LIABLE FOR INTEREST when money is tied up in his hands by a rule of court, although the purchasers may be responsible to him for interest during the same period.

ERROR to the common pleas to reverse a judgment obtained by the defendant in error, who was plaintiff below, in an action of assumpsit for money had and received, brought against Stewart, late sheriff, plaintiff in error, who was defendant below. The facts were: The plaintiff below, having a judgment against Beelen & Co, merchants, had obtained a *fi. fa.* thereon and placed it in the defendant's hands. A prior *fi. fa.* had been issued and delivered to the defendant upon a judgment recovered by the Bank of Pittsburg, against the said Beelen & Co., which writ was, by the instruction of the plaintiffs, levied upon the personal property of the said Beelen & Co., and a sale made by the defendant, as sheriff, thereon. The plaintiff in the present action obtained from the court of common pleas, from which both executions issued, a rule on the bank of Pittsburg to show cause why their execution should not be quashed, which rule was still pending, having neither been dismissed nor made absolute by the court. The plaintiff, claiming that the prior execution was illegally issued, brought this action to recover the money made thereon and to have it applied on his own execution. It was proved that the execution in favor of the bank was issued June 10, 1823, upon a judgment entered by virtue of a bond given by Beelen & Co. to the bank, dated April 23, 1823, with a warrant of attorney to confess judgment thereon. The condition of the bond was that the obligors should pay certain notes made by them, payable sixty days after date, and discounted by the bank, and all notes given in renewal thereof, and indemnify and save harmless the said bank with respect to said notes, and that if they should do so the bond should be void, otherwise to remain in full force and effect. The bond had on the back of it a writing, signed by the indorsers on the notes, to the effect that it was taken with their approval and that they held themselves responsible the same as if the bond had not been taken. The plaintiff's objection was that the execution in favor of the bank was issued before the notes secured by the bond became due.

The evidence was not all contained in the record, but from the charge of the court it appeared that the bank's execution was issued with the assent of Beelen & Co., and also, that one Poe, who was the plaintiff's agent, had requested the attorney of the bank to issue the said execution. The charge was, in substance, that the plaintiff, not being a party to the action between the bank and Beelen & Co., and having no interest in the judgment and execution, might impugn the validity of said execution, notwithstanding his agent's assent thereto, and that of the defendants in execution; and notwithstanding the fact that the plaintiff had applied to the court to set the execution aside and that he had apparently delayed or neglected to prosecute said application, and that although the sale on said execution was good and passed title to the purchasers, the plaintiff might recover the proceeds to the exclusion of the bank. Judgment for the plaintiff, and the defendant brought the case here on sundry errors, assigned in the charge of the court, which appear from the arguments of the counsel and from the opinion.

Ross and McDonald, for the plaintiff in error, contended: 1. That a debtor may lawfully prefer one creditor to another: 1 Ves. 212, 213; Went. Ex. 143; *Will v. Franklin*, 1 Binn. 502 [2 Am. Dec. 474]; *Lippincott v. Barker*, 2 Id. 186 [4 Am. Dec. 433]; 2. That a judgment of one court can not be collaterally impeached in another: *Heister v. Fortner*, 2 Binn. 40 [4 Am. Dec. 417]; *Allison v. Rankin*, 7 Serg. & R. 271; *Lewis v. Smith*, 2 Id. 155, 161, 162; *Shirley v. Wright*, 2 Id. Raym. 775; Salk. 273; 3 Johns. 20; 5 Id. 53; 8 Id. 284; 3. That the plaintiff below was bound by his agent's assent to the execution and sale; and that having moved to set aside the execution he could not resort to this action; 4. That the court erred in charging the jury that the bank's execution could not legally issue before the notes were due, even with the assent of the debtors: *Lisle v. Ducomb*, 5 Binn. 585; 5. That the court erred in charging the jury that the plaintiff could recover his whole debt, with interest from the date of the sale, because, as a matter of fact, the purchasers had not then paid for the goods.

Baldwin and Fetterman, contra.

By Court, TILGHMAN, C. J. The plaintiff says that the execution was issued before the notes fell due, and therefore it was irregular and void. We know nothing of the evidence given on the trial of the cause except what is mentioned in the charge of the court, to which the counsel for the defendant took a number of exceptions.

The great objection to the plaintiff's action, and, indeed, it seems to me to be insuperable, is that it calls in question the validity of an execution issued on a judgment in a court of competent jurisdiction. The judgment on the bond of Beelen & Co. to the Bank of Pittsburgh was regular; nor does the warrant of attorney, by virtue of which it was entered, make any mention of a stay of execution. The execution was not void. The most that can be said against it is that it was irregular and erroneous. If erroneous, it might have been reversed on a writ of error, or the court of common pleas might have inquired into the matter in a summary way and quashed it.

But, without resorting to either of these remedies, the plaintiff has undertaken to invalidate it collaterally in this action. This is against all principle. The execution, until quashed or reversed, is good. The sheriff was bound to obey it, and the execution of the bank, having come first to his hands, had a preference. If two executions are delivered to the sheriff, one after the other, the one first delivered has the preference, and if the sheriff pays the money to the plaintiff in the last execution, the other may maintain an action against him. In that action the court will inquire into the fact which execution came first to the sheriff's hand, but no inquiry is permitted which might tend to the invalidating of either execution on the ground of error or irregularity. It was decided by this court in *Lewis v. Smith*, 2 Serg. & R. 142, that a judgment erroneously entered is valid until reversed. And the same principle extends to an execution. It would make strange confusion if an execution issued by a court of competent jurisdiction, and unreversed, could be investigated and treated as a nullity in another court. To this rule there is one exception, and that is where a judgment is entered by collusion between the defendant and plaintiff, in fraud of a third person. For instance, if an executor confesses judgment where no debt was due, with a view of defrauding other creditors, there an action being brought by one of the other creditors, if the judgment be pleaded in bar, the plaintiff may reply that it was confessed by fraud.

The same principle was established, on great consideration, in the *Duchess of Kingston's case*, where a decree of the ecclesiastical court was impeached on the ground of fraud. But there is no question of fraud upon this record. No matter of fraud was submitted to the jury. The plaintiff complains that the execution for the Bank of Pittsburgh was issued before the debt on the promissory notes, to secure the payment of which the

bond was given, became due. I shall intimate no opinion on that question, but if the plaintiff has been injured by an improper use of the process of the court of common pleas, that court may do him justice by quashing the execution, and if there should be contested facts which the court does not think proper to decide, it may direct an issue for that purpose. There is no weight in the objection, made by the counsel for the defendant, that the plaintiff was not a party to the suit between the Bank of Pittsburgh and Beelen & Co. There are many instances in which courts will permit a third person, who has been injured by their proceedings, to appear and assert his rights.

There was another exception to the charge of the court, on which it may be proper to give an opinion. The court charged, that if the verdict should be for the plaintiff, he would be entitled to interest from the time the sheriff sold the goods of Beelen & Co., because the purchasers of these goods had not paid for them, and, therefore, they ought to pay interest to the sheriff. In this respect, I think the charge was incorrect. The action is not against the purchasers, but the sheriff; and the declaration avers that the sheriff received the money. Now suppose the money is in the hands of the sheriff, which the plaintiff is bound to suppose, it was tied up by the rule of court, to show cause why the execution of the bank should not be quashed. The sheriff could not pay the money to either party till that rule was disposed of; and, consequently, he can not be liable to the payment of interest, which is never demandable unless money is unlawfully withheld.

I am of opinion, upon the whole, that the judgment should be reversed.

Judgment reversed.

CITED TO THE POINT that a judgment entered on a bond and warrant of attorney, contrary to an agreement between the parties, can not be collaterally impeached: *Stradling v. Henck*, 2 Phila. 303; that an execution issued upon an award before the expiration of the time allowed to appeal therefrom is not void: *Wilkinson's Appeal*, 65 Pa. St. 190: see, also, *Darlington's Appropriation*, 13 Id. 432. That an execution irregularly issued can not be collaterally impeached, see: *Jackson v. Delancy*, 7 Am. Dec. 403.

AMMANT v. NEW ALEXANDRIA & PITTSBURGH TURN-PIKE ROAD.

[13 SERGEANT & RAWLE, 210.]

EXECUTION, PROPERTY SUBJECT TO—A TURNPIKE ROAD is not the subject of levy under execution, where the defendant has no interest in the land, and no right save that of maintaining the road and receiving tolls.

QUASHING LEVY.—If intangible property not subject to execution be blended in a levy with other property, so that it is difficult to separate them, the whole levy may be quashed.

ERROR to the common pleas to reverse a judgment setting aside a levy of execution and the inquisition and other proceedings thereunder. The facts are stated in the opinion.

Coulter, for the plaintiff in error.

Alexander, for the defendants in error, contended that the ordinary process of execution is not the proper method of enforcing a judgment against a corporation: 2 Bac. Abr., 11, Corporation, E., sec. 2, and cases cited; Id., Execution, C.

By Court, **TILGHMAN, C. J.** The plaintiff in error, George Ammant, having obtained a judgment against the president, managers, and company of the New Alexandria and Pittsburgh turnpike road, issued a *fiери facias*, and levied on "all the right, title, interest, and claim of the defendants, of, in, and to, ten miles of the New Alexandria and Pittsburgh turnpike road, lying and being, five miles east and five miles west of the gate erected on the road adjacent to New Salem, together with the said gate, and the toll-house, erected contiguous thereto, and the lot of ground on which the said house is built, together with the appurtenances." The question is, whether property of this kind is subject to a levy by virtue of a *fiери facias*.

It has been decided, that every kind of interest in land, legal or equitable, is subject to an execution in this state. But it does not appear that the turnpike company had any estate of any kind, in the land over which this road runs. They were incorporated by the legislature for a special purpose, in which the public were much interested. They were permitted to enter on the land; and make a road, under certain regulations, and when the road was finished and approved by the governor, to take certain tolls. But there is nothing in the incorporating act which authorizes the company to transfer their right to other persons; and such transfer would certainly be inconsistent with the whole design and object of the law. It was presumed, that the

right would remain in this corporation, and the act contains a complete system providing redress in cases of delinquency, and calculated to protect the public from the consequences of such delinquency. The inconvenience would be excessive, if the right of the company could be cut up into an indefinite number of small parts, and vested in individuals. The defendants had no tangible interest, nothing which could be delivered by the sheriff to a purchaser under the execution. There was no rent or profit of any kind, issuing out of land, nothing but a right to receive toll for horses, carriages, etc., passing over the land, which would be more or less according to the number of passengers, and that would much depend on the condition in which the road should be kept. Every kind of right, or license granted by the act of assembly, was confined to the company. They alone were confided in. They alone were looked to for a faithful performance of the important duties incumbent on them. But it may be said to be extremely hard, that a corporation should be permitted to contract debts, and possesses the means of paying them, and yet their creditors should have no power of coercion. And certainly such a state of things is both hard and unjust.

But it does not follow that the proper remedy is by execution. Experience is every day pointing out defects in our law, which can be remedied only by the legislative power. And the defect which now appears is well worthy of, and will, no doubt, receive the attention of our legislature. It may probably be thought advisable to provide some mode of sequestration, by which the profits arising from roads may be secured to the creditors of the respective companies. But in providing this remedy, the public interest will not be neglected. Care will be taken that so much of the tolls as is necessary, shall, in the first place, be applied to the repair of the road, and only the net profits subject to the payment of debts. A court of chancery would do something of this kind, but our courts possess no such power. All that we can do, is to levy on the property, and either sell it, or deliver it to the creditor, in case the rents and profits will pay the debt in seven years. But this kind of proceeding is altogether unsuitable, in a case like the present, and, therefore, I am of opinion, that the court of common pleas was right in quashing the proceedings. If a turnpike company has a right to land, or other property, not on the road, there is no reason why it should not be subject to an execution. But in the present instance, the levy though made in part on a lot of land,

contiguous to the road, had so blended the different subjects, that it was difficult to separate them, and therefore the court was justified in quashing the whole proceedings. I am of opinion that the judgment should be affirmed.

Judgment affirmed.

FRANCHISES NOT SUBJECT TO EXECUTION.—The principle here laid down, that corporate franchises and rights are not subject to an ordinary execution, unless made so by statute, is one of the established doctrines of the common law. A "franchise, being an incorporeal hereditament, can not, upon the settled principles of the common law, be seized under a *feri facias*." *Gue v. Tide Water Canal Co.*, 24 How. U. S. 263; *Stewart v. Jones*, 40 Mo. 140; *Munroe v. Thomas*, 5 Cal. 470; *Thomas v. Armstrong*, 7 Id. 286; *Winchester etc. Turnpike Co. v. Vimont*, 5 B. Mon. 1; *Arthur v. C. & R. Bank*, 9 Smedes & M. 431; *Ludlow v. Hurd*, 6 Am. Law Reg. 493; *Hatcher v. T. W. & W. R. R. Co.*, 62 Ill. 477; *Seymour v. M. & C. Turnpike Co.*, 10 Ohio, 476; Freeman on Executions, sec. 179. The principal case is regarded as a leading one on this subject, particularly in Pennsylvania, and the doctrine it lays down has been approved and applied in many subsequent decisions in that state and elsewhere: *Leedom v. Plymouth etc. R. R. Co.*, 5 Watts & S. 266; *Susquehanna Canal Co. v. Bonham*, 9 Id. 28; *Spear v. Allison*, 20 Pa. St. 200; *Steiner's Appeal*, 27 Id. 315; *Plymouth etc. R. R. Co. v. Colwell*, 39 Id. 337; *Shamokin etc. R. R. Co. v. Livermore*, 47 Id. 470; *Western Penna. R. R. Co. v. Johnston*, 59 Id. 294; *Foster v. Fowler*, 60 Id. 32; *Youngman v. Elmira etc. R. R. Co.*, 65 Id. 286; *Covey v. Pittsburg etc. R. R. Co.*, 3 Phila. 180; *Loudenschlager v. Benton*, 4 Id. 387, S. C., 3 Grant, 390; *Hart v. Burnett*, 15 Cal. 590; *McPheeters v. Merri-mac etc. Co.*, 28 Mo. 467.

GROUND OF EXEMPTION.—"While franchises have been held not to be subject to execution, for the avowed reason that they are intangible, and can not be delivered by the sheriff to the purchaser, it seems to be doubtful whether this is the true, or, at all events, the only ground upon which such exemption rests. If this were the only ground, the exemption could not operate for the protection of tangible property capable of delivery by the officer; but it is contended that the exemption of a franchise extends to all property essential to its enjoyment, whether tangible or intangible." Freeman on Executions, sec. 179. Thus, in *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 28, a house occupied by a collector of tolls on a canal, was held exempt from levy and sale under a *f. fa.* So, in *Covey v. Pittsburg etc. R. R. Co.* 3 Phila. 180, it was held that the same exemption applied to the cars of a railroad company, as being essential to the use and enjoyment of the franchise. So, in *Gue v. Tide Water Canal Co.*, 24 How. U. S. 263, that the locks, wharf, house and land belonging to a canal company, and necessary to the operation of its canal, could not be seized and sold. On the other hand, in *Plymouth etc. R. R. Co. v. Colwell*, 39 Pa. St. 337, and *Shamokin etc. R. R. Co. v. Livermore*, 47 Id. 470, the exemption did not apply to land or town lots owned by a railway corporation, and not necessary to the working of its road. The position taken in these cases, that the exemption covers not merely the intangible franchise of a corporation, but also its tangible property, essential to the enjoyment of such franchise, is sustainable only upon the theory that the franchise is granted for the furtherance of certain objects which the granting power considers so important, that it will neither tolerate private interference with the franchise, nor with other property, without which the objects sought could

not be accomplished. Such a doctrine would, therefore, seem to be appropriate only to corporations in whose existence the public have an interest, such as railroad, canal and turnpike companies, etc.

EXEMPTION NOT FAVORED IN MANY OF THE STATES.—In several of the states, the exemption of corporate property from execution and sale, even where such property is essential to the enjoyment of its franchise, is not regarded with much favor. Thus, in North Carolina, the property of a corporation may be seized and sold on execution, although the corporation will be thereby deprived of the means of enjoying its franchise: *State v. Rives*, 5 Ired. 306; and the decisions in Mississippi and Missouri tend strongly toward the same conclusion: *Arthur v. C. & R. Bank*, 9 Smedes & M. 431; *Stewart v. Jones*, 40 Mo. 140; see *Rail Road Co. v. James*, 6 Wall. 750; *Coe v. C. P. & I. R. R. Co.*, 10 Ohio St. 372; *Covington Co. v. Shepard*, 21 How. U. S. 112. In most of the states, statutes have been enacted under which franchises, and all property connected therewith, may be made available in satisfaction of judgments recovered against their owners. In Pennsylvania, in accordance with the suggestion of Tilghman, C. J., in the principal case, provision was made by the legislature, in 1836, for the sequestration of the profits of corporations to satisfy judgments against them: *Reed v. Penrose*, 36 Pa. St. 240, S. C., 2 Grant, 500; *Loudenschlager v. Benton*, 3 Grant, 390. In 1870 it was further provided that the franchises and other property of corporations might be sold on execution: *Philadelphia etc., R. R. Co.'s Appeal*, 70 Pa. St. 355. With reference to statutes of this kind, generally, it may be remarked that the principle seems to be that, as they are in derogation of the common law, they must be strictly pursued to impart validity to sales or sequestrations of property under them: *James v. Plank Road Co.*, 8 Mich. 91.

WHEN EXEMPTION CEASES.—Conceding that the property of a corporation, necessary to the exercise of its franchise, is exempt from execution, such exemption can not continue after the exercise of the franchise has been abandoned. Thus, where a railroad company ceases to use a portion of its road for public purposes, and proceeds to take up and carry away the rails, such portion may be levied on and sold: *Benedict v. Heineberg*, 43 Vt. 231.

SICKMAN v. LAPSLEY.

[13 SERGEANT & RAWLE, 224.]

FRAUDULENT DONOR OR VENDOR will not be permitted to set up his own iniquity to avoid his own act or deed. Fraud is irrevocable as to him who commits it.

IF EVIDENCE BE OFFERED FOR ONE PURPOSE and rejected, the lower court will be sustained, though the evidence is admissible for another purpose than the one for which it was offered.

INTEREST ALLOWED AGAINST A GARNISHEE, where he withheld more money from his creditor than was necessary to discharge the garnishment.

ERROR to the common pleas. The defendant in error, who was plaintiff below, brought *indebitatus assumpsit* to recover the value of certain leasehold property, consisting of a bark-mill, etc., sold to the defendant, and gave in evidence certain admis-

sions to prove that the price agreed on was nine hundred dollars. The defendant gave in evidence an admission of the plaintiff to show that the balance due was only three hundred dollars. And something having been said by the plaintiff's witnesses about a receipt for nine hundred dollars, the defendant offered in evidence a receipt in full for that sum from the plaintiff, stating that he did so for the purpose of showing fraud in the plaintiff against his creditors in giving such a receipt when, in fact, three hundred dollars remained due, and that the receipt was void; and, further, to show that the receipt was a nullity, he offered one J. Morrison as a witness to prove the value of the mill. The evidence, being objected to, was rejected, and the defendant excepted. The defendant also gave in evidence an attachment served on him as garnishee by a creditor of the plaintiff, and claimed that he was excused from interest on the whole sum due to the plaintiff pending the attachment, and requested the court so to charge. The court, however, charged the jury, in substance, that the defendant was exempted by said attachment from the payment of interest only to the extent of the attaching creditor's claim, together with a liberal allowance for costs and expenses, and left it to the jury to decide as to the probability of the defendant being able to ascertain such amount. Verdict and judgment for the plaintiff, and the defendant sued out this writ of error.

McDonald, for the plaintiffs in error, cited *Fitzgerald v. Caldwell*, 2 Dall. 215, S. C., 1 Yeates, 279; *Willings v. Consequa*, 1 Pet. 321; 4 Mass. 170.

Biddle, contra, cited 3 Binn. 121; Serg. on Attach. 167, 168.

By Court, DUNCAN, J. If the plaintiff in error had stopped with giving in evidence the receipt, and stuck to that as payment, his opponent might have had a case from which he would have found it difficult to escape, if it were so, as was alleged, that the receipt was given for the purpose of defrauding his creditors. He never could have convicted himself of that fraud. The receipt would have been good against him. A fraudulent donor can not set up his own fraud to set aside an instrument for that fraud: 6 Co. 18; Hob. 106; 7 Johns. 162.

In *Reichart v. Castator*, 5 Binn. [6 Am. Dec. 402], it was decided that an instrument, however fraudulent as to creditors, as to the party is binding and valid, and neither in courts of law or equity would he be permitted to aver against his own voluntary iniquity. A man shall not be permitted to set up

his iniquity as a defense any more than as a cause of action: *Montefiori v. Montefiori*, 1 W. Bl. 363. Fraud is irrevocable as to him who commits it: 1 Fonb. 164. The maxim that fraud vitiates every contract is always applied *ad hominem*, that is, to the party on whom the fraud is committed; but he who is himself a party to the fraud, and does that act for the purpose of defrauding his creditors, shall not set up the fraud in a controversy between him and his partner in iniquity—his companion in fraud—his brother conspirator. The plaintiff below could never have been received to prove that the nine hundred dollars had never been paid, and the receipt a mere sham to keep off his creditors. When he brings a suit for the price of a thing sold, and the vendee produces his receipt, he shall not be received to say, I gave the receipt for money that was not paid, for the purpose of defrauding my creditors; *allegans suam turpitudinem non est audiendus*. It would have behooved him to have shown that the receipt was given by mistake or for some honest purpose; and why a man involved in debt and on the eve of going off should give such a receipt for any honest purpose cannot well be imagined.

In considering exceptions to evidence it is always to be taken into view, for what purpose and to prove what fact it was offered. If the party offers it to prove one fact and for one purpose, and it is rejected as evidence for that purpose, in reviewing the judgment of the inferior court, the reviewing court will not sustain the objection, though it might be evidence to prove something else than what it never was offered to prove; for that would be laying a snare for his adversary as well as for the court. The question always is, was it good evidence for the purpose for which it was offered. This has been repeatedly decided by this court. Now, James Morrison was offered to prove the value of the mill, and for what purpose—in further proof of the nullity of the receipt, not to disprove the allegation that the lease was sold for nine hundred dollars, by showing from the gross inadequacy of its value, that this could not have been the agreement, but to show a conspiracy between the parties to cheat the creditors of one of them. The receipt was the voluntary act of the plaintiff in error, who gave it in evidence for the purpose of nullifying it. The receipt was null, as he said, because the lease was not worth nine hundred dollars. For this purpose the evidence was inadmissible, and was properly rejected. It may be that the plaintiff received more than he ought to have done. I have no opinion to give on this subject,

but if he did there is not much cause for regret. It is a just punishment on the defendant, who admits that he combined with the plaintiff to defraud his creditors, and a warning to others.

The charge of the court was entirely correct, on the allowance of interest during the time the debt was attached on Patterson's suit. The sum claimed in this action is six hundred dollars. The sum for which the foreign attachment issued was about half that sum; the exact sum was stated in the writ. Beyond that the garnishee could not have been made liable. He might have safely paid his creditor the residue, after liberal allowance for interest to accrue, costs, and his expenses. It would be most unreasonable, that, where the debt claimed is a large one, and the debt for which the attachment issued is a small one, that interest should be suspended during the pendency of the action on the whole sum. The debt and interest, which would reasonably accumulate, the costs of the attachment, and liberal allowance to the garnishee for his expenses, is the true principle. The jury had data to ascertain what that ought to be, and for that the interest should cease, but not beyond it. If the debt was ten thousand dollars, and one hundred only attached in the hands of the debtor, it would shock our understanding; all mankind would cry out against the law if it pronounced that the creditor should lose the interest on his ten thousand dollars, to meet the debt of one hundred dollars. The damages are given in lieu of interest for the unjust detention of the debt. The debtor would be unjust, where ten thousand dollars were detained, to indemnify only against one hundred dollars.

There has been no direct precedent produced, but the sound sense of the rule, stated by the court of common pleas, recommends it for adoption. *Fitzgerald v. Caldwell*, as reported in 1 Yeates, 247, seems to convey the opinion of chief justice McKean, that the interest only ceases on the sum for which the attachment is laid. He says no interest is to be allowed in that particular case, because the attachment was laid for a larger sum than the debt attached. No other reason can be given for this conclusion of the chief justice, than the one I have stated.

Judgment affirmed.

FRAUDULENT GRANTOR OR DONOR CAN NOT AVOID HIS ACT.—It is perfectly well settled, in accordance with the doctrine here laid down, that a

conveyance or other executed contract made for the purpose of hindering, delaying, or defrauding creditors is binding upon the grantor and his heirs: *Osborne v. Moss*, 5 Am. Dec. 252, and note; *Jackson v. Marshall*, 3 Id. 695; *Reichart v. Castator*, 6 Id. 402; *Peaslee v. Barney*, Id. 743; *Hendricks v. Mount*, 8 Id. 623; *Terrell's Heirs v. Cropper*, 13 Id. 309; *Jenkins v. Clement*, 14 Id. 703, note; *Hartley v. McNulty*, 4 Yeates, 95; *Church v. Church*, Id. 280; *Telford v. Adams*, 6 Watts, 434; *Stewart v. Iglehart*, 7 Gill & J. 132; *Freeman v. Sedwick*, 6 Gill, 28; *Cushwa v. Cushwa*, 5 Md. 44; *Inhabitants of Canton v. Inhabitants of Dorchester*, 8 Met. 525; *Tuesley v. Robinson*, 103 Mass. 558; *Starke v. Littlepage*, 4 Rand. 368; *Terrell v. Imboden*, 10 Leigh, 321; *Gifford v. Ford*, 5 Vt. 532; *Gillespie v. Gillespie*, 2 Bibb, 89; *Dale v. Harrison*, 4 Id. 65; *Stewart v. Dailey*, Litt. Sel. Cas. 212; *Sumner v. Murphy*, 2 Hill, (S. C.) 488; *Newell v. Newell*, 34 Miss. 385; *Shaw v. Millsaps*, 50 Id. 380; *Byrd v. Curlin*, 1 Humph. 466; *Noble v. Noble*, 26 Ark. 317; *Taylor v. Williams*, 1 Ired. 249; *Williams v. Aven*, 5 Ired. Eq. 47; *Beale v. Hall*, 22 Ga. 431; *Laney v. Laney*, 2 Ind. 196; *O'Neil v. Chandler*, 42 Id. 471; *Van Wy v. Clark*, 50 Id. 259; *Edwards v. Haverstick*, 53 Id. 348; *Hess v. Final*, 32 Mich. 515; *Crawford v. Lehr*, 20 Kan. 500; *Ober v. Howard*, 11 Mo. 425; *McLaughlin v. McLaughlin*, 16 Id. 242; *Hall v. Callahan*, 66 Id. 316; *Allison v. Hagan*, 12 Nev. 38; *Danzey v. Smith*, 4 Tex. 411; *Kimball v. Eaton*, 8 N. H. 391; *Jewell v. Porter*, 31 Id. 34; *Jackson v. Garnsey*, 16 Johns. 189; *Stewart v. Ackley*, 52 Barb. 283; *Scholey v. Worcester*, 6 Thomp. & C. (N. Y.) 574; S. C., 4 Hun, 302; *Jackson v. Dutton*, 3 Harring. 96; *Barton v. Morris*, 15 Ohio, 406; *Tremper v. Barton*, 18 Id. 418; *Dearman v. Radcliffe*, 5 Ala. 192; *Clemens v. Clemens*, 28 Wis. 637; *Dietrich v. Koch*, 35 Id. 618; *Lokerson v. Stillwell*, 13 N. J. Eq. (2 Beas.) 397; *Horner v. Zimmerman*, 45 Ill. 14; *Harmon v. Harmon*, 63 Id. 512; *Murdock v. Wells*, 9 W. Va. 552; *Kinney v. Consolidated Va. Min. Co.*, 4 Sawyer, 382; *Bump on Fraud. Con.* 442, *et seq.* But the rule does not apply, it seems, where the grantor is not in *pari delicto* with the grantees; as where a creditor availed himself of his power over his debtor and induced him by misrepresentation to make a fraudulent conveyance to him: *Austin v. Winston*, 3 Am. Dec. 583, and note; see also *Freelove v. Cole*, 41 Barb. 318. In most of the states it seems to be settled by statute or by judicial decisions that an executor or administrator of a grantor who has executed a conveyance or transfer of his property to defraud creditors may, as the representative of the creditors, recover the property so transferred, so far, at least, as is necessary for the payment of debts; see the note to *Ewing v. Handley*, 14 Am. Dec. 157. But a contrary doctrine is held in many cases: *Peaslee v. Barney*, 6 Am. Dec. 743; *Osborne v. Moss*, 5 Id. 252; *Bump on Fraud. Con.* 444, note. Certainly the better view seems to be that the executor or administrator should have the right to impeach such a transfer, so far as necessary to protect the interests of creditors.

As to who may impeach fraudulent conveyances generally, see the note to *Jenkins v. Clement*, 14 Am. Dec. 703. That, in considering exceptions to evidence, regard must be had to the purpose for which such evidence was offered, see *Eyrick v. Hetrick*, 13 Pa. St. 491, approving the principal case on this point.

In *Jackson v. Lloyd*, 44 Pa. St. 85, the principal case is also referred to as laying down the correct rule as to how far interest is chargeable against a garnishee.

BUCHANAN v. MOORE.

[13 SERGEANT & RAWLE, 304.]

MISREPRESENTATIONS AT EXECUTION SALE made by the defendant to the effect that a certain tract of land was included in the levy, whereby an innocent purchaser was induced to bid on the theory that such land was embraced in the sale, will give the purchaser a good title in equity, though the land was not included in the levy; and, after the execution of the deed, the defendant is not entitled to have the sale vacated on repaying the purchaser the amount of his bid and all expenses.

ERROR to the common pleas. The defendant in error, who was the plaintiff below, brought ejectment to recover certain land claimed by him under a sheriff's deed executed to him as purchaser at a sale on an execution issued against the defendant Buchanan. The plaintiff, in order to prove that the particular tract in dispute was included in the levy made under the execution, gave in evidence certain declarations and representations made by the said Buchanan in the presence of the plaintiff and others, at the time of the sale, to the effect that said tract was included in the levy, and proved that the plaintiff purchased under that impression. The defendant proved that shortly after the sale, and before the plaintiff had expended anything for improvements or repairs, he, the defendant, offered, if the plaintiff would relinquish his purchase, to refund the purchase-money and costs of the deed, and to pay him one hundred dollars besides, which the plaintiff refused.

The defendant claimed that he should not be bound by his declarations at the sale, because he made them under the honest belief that they were true, and also that the plaintiff could not, in equity, claim the land after the defendant's offer, above-mentioned. But the court charged that if the levy was such in its terms that it might reasonably include the premises in dispute, and if the defendant represented at the sale that it did include them, and the plaintiff bought with that understanding, the defendant was bound, although the levy was not intended to include the land, and although both parties were honestly mistaken in believing that it was included, and that the plaintiff was entitled to the possession, which right could not be impaired by the subsequent offer made by the defendant, or its refusal by the plaintiff. Verdict and judgment for the plaintiff; whereupon the defendant sued out this writ assigning error in the instructions above mentioned.

Carothers, for the plaintiff in error.

Ramsey and Metzger, contra.

By Court, GIBSON, J. The points made by the plaintiffs in error, are founded on an assumption of the fact that the tract for which he took defense in the court below was actually excluded by the levy, in consequence of which it was sold. If, by reason of the defendant's declarations at the sale, the plaintiff was induced to purchase, under a belief that it was included, although the sheriff's deed would not convey the legal title, yet his purchase would give him an equity, which chancery would render effectual by decreeing a conveyance; and this, whether such declarations proceeded from design, or a misapprehension of the fact. If both were equally innocent, a loss, in consequence of the acts or declarations of the one, ought not to be borne by the other.

Then it remains to be considered how far this result may be varied by the defendant's offer to take the whole purchase off the plaintiff's hands, and compensate the trouble and expense which he had incurred. This offer was made after the sheriff's deed had been acknowledged. The consequences of the common mistake of all parties may be obviated, by setting aside the sale, and again putting the property up, on fair terms; but to this, which I take to be the only remedy of which the case is susceptible, recourse can not be had after the sale has been carried into effect by a conveyance. But an offer to take the property off the purchaser's hands is quite a different thing. If the debtor can put him exactly in the situation he would have held if he had purchased with full knowledge of the facts, it is all very well; but if he can not repair the consequences of his own mistake but by depriving the purchaser of his bargain, how can he complain? The property may, from accidental circumstances, be worth much more to the purchaser than its intrinsic value; and his object in making the purchase ought not to be frustrated by correcting, at his expense, an error of which he was not the author. And besides, if all parties acted under the same misapprehension, and both tracts were *bona fide* bid for, as if both had actually been included in the levy, what harm has been done? The presumption is that the whole was sold for a fair price, and there has been no sacrifice of an unnecessary quantity; for the proceeds of the sale were insufficient to satisfy the debt. Nothing could defeat the plaintiff's equity but proof of his having been informed of the true state of the fact, and having permitted the defendant to labor under the consequences of his mistake. It is, therefore, clear that the

court was right in directing the jury, that these points, as proposed by the plaintiff's counsel, were not sustainable.

Judgment affirmed.

APPROVED AND FOLLOWED in *Epley v. Witherow*, 7 Watts, 168, and *Bisler v. Gilliland*, 4 Pa. St. 158, in which cases it was held that one standing by at an execution sale, and permitting property in which he claimed an interest to be sold without asserting his claim, would be estopped from afterwards setting it up. So in *Millingar v. Sorg*, 55 Pa. St. 226, it was held, on the authority of the principal case, and other similar decisions, that where one sold land and by mistake pointed it out as part of a particular tract, he would be estopped afterwards from asserting the contrary to the injury of the purchaser.

RAYMOND v. BAAR.

[13 SERGEANT & RAWLE, 318.]

NEGLECT—COUNTERFEIT MONEY.—One who receives a counterfeit note from an innocent person and keeps it six months after knowing its true character, without giving any notice thereof, is guilty of gross negligence and must sustain the loss.

ERROR to the common pleas. The plaintiff in error, who was the plaintiff below, brought *indebitatus assumpsit* against the defendant for goods sold and delivered and on the common money counts. At the trial it appeared that, in the plaintiff's absence in March, 1819, his clerk sold the defendant certain goods and took in payment a ten-dollar bank note, paying the difference in money; that, on the plaintiff's return, he pronounced the note a counterfeit, but retained it in his possession for six months and then notified the defendant, who declined to take the note back. That the note was a counterfeit was fully proved. The court below charged the jury that the plaintiff was precluded from recovering by his having retained the note an unreasonable time without a demand on the defendant, if the latter did not know that it was a counterfeit. Verdict and judgment for the defendant, whereupon the plaintiff sued out this writ of error, assigning error in the charge of the court.

Burnside, for the plaintiff in error.

McMullin, contra.

By COURT. This is a very plain case. The plaintiff was guilty of most unreasonable negligence. He kept the note six months after he knew it to be counterfeit, without giving notice to the defendant. It was his duty to return it to the defendant as soon as he discovered it to be counterfeit. There was no sug-

gestion of fraud in the defendant in passing the note to the plaintiff. He supposed it to be genuine. If it had been returned to him in any reasonable time, he might have had recourse to the person from whom he received it. But in consequence of the plaintiff retaining it so long, he has lost all chance of redress, because it would be extremely difficult, after the lapse of six months, to identify the note or prove from whom it was received. No plausible reason has been or can be given in justification of the plaintiff's conduct. It was what is termed in law *crassa negligentia*, gross negligence, and he ought to suffer for it. The charge of the court of common pleas was perfectly correct, and the judgment should be affirmed.

Judgment affirmed.

FOLLOWED in *Cucler v. Pennock*, 14 Serg. & R. 56, where it was held that where one took certain spurious foreign coins, after asking and obtaining time to satisfy himself of their genuineness and value, and discovered, after having kept them in his possession for three years, that they were counterfeit, he could not maintain an action for the consideration given for them, there being no fraud or warranty. So in *Rick v. Kelly*, 30 Pa. St. 530, where it was decided that an action to recover the consideration paid for a note upon which there was a forged indorsement was barred by a delay of several months in making demand after discovering the forgery.

CULLER v. MOTZER.

[12 SERGEANT & RAWLE, 366.]

ADVERSE POSSESSION TO CO-TENANT.—One who, under a deed purporting to convey in severalty, enters upon the possession of land, holds it adversely to the whole world, though his grantor held as a tenant in common with others.

POSSESSION WHEN ADVERSE TO WIFE.—One who enters on land under a deed from a husband, does not enter adversely to the husband's right, and hence, the statute of limitations will not commence running against the wife until the husband's death.

ERROR to the common pleas. Motzer, the defendant in error, who was plaintiff below, brought debt on a bond given by the plaintiffs in error, who were defendants below, for the purchase price of certain land conveyed by the defendant in error to Culler, one of the plaintiffs in error. Payment was pleaded, and the defense was a defect of title and an outstanding claim of dower. The title arose out of an improvement devised in 1775, in equal parts, to Mary Brown and James Brown. Mary died intestate, leaving as her heirs, William and Nancy Brown, each being entitled to one fourth of the premises. In 1799,

William Brown and one George Brown conveyed to Martin Motzer, the deed, reciting that on the — day of —, 1797, Nancy Brown had conveyed her interest to the said William and George. The said George and William came into possession before 1799, and the land had ever since continued in their possession or that of those claiming under them. In 1800, William Brown having obtained a patent to the whole tract in his own name, made a new conveyance of the same to Martin Motzer. The defendant in error derived title from Martin Motzer. It was insisted by the plaintiffs in error that the titles of James and Nancy Brown were still outstanding, as also the claim to dower of George's wife, who was still living. The charge was substantially in favor of the defendant in error. The material points in it appear from the assignments of error. Verdict and judgment for the defendant in error, and the plaintiffs in error sued out this writ, and assigned as error, that the court erred in charging the jury: 1. That where one tenant in common conveys the whole tract and possession, is taken and held under such conveyance for twenty-one years or more, his co-tenant is barred by the statute of limitations; 2. That where a husband's right is barred by adverse possession for the statutory period, the wife's right to dower is also barred, although the time was running during coverture, and although the adverse possessor came in under her husband's deed; 3. That the right of George Brown's widow to dower could be barred by statute under the facts of this case; 4. That where tenants in common hold under one title, and one ousts the others, and is in exclusive possession of the whole tract, as farms are usually held and enjoyed, the statute runs as to the whole tract; and, 5. That the title of Nancy Brown could, under the circumstances, be barred by the statute.

Penrose, for the plaintiffs in error.

Wadsworth, *contra*.

By Court, DUNCAN, J. [after stating the facts]: On this statement of facts, James's right, it is contended, was barred by the statute of limitations. The court decided that the statute operated against a tenant in common if his co-tenant has sold the whole, and possession has been taken of the whole, and held adversely to him for twenty-one years in pursuance of such sale. The possession here was for twenty-five years, in denial of the right of the other; for the sale of the whole, and the possession under such sale, would amount to an ouster.

The purchaser who came into possession in 1800 came into possession under a title adverse. Motzer could never be considered as a co-tenant, and as the bailiff and receiver of James Brown, and as such accountable for the profits in an action of account-render. He never entered as a tenant in common, and the charge of the court was altogether correct, for this was one entire tract of land, to which there was no adverse claim, and therefore the actual possession was co-extensive with the claim. That was the only right, and the possession, there being no adverse title, was according to that right. There ought not, consequently, to be made any deduction on account of James's supposed outstanding title: *Jackson ex dem. Preston v. Smith*, 13 Johns. 406. Possession of land by a purchaser, under a deed of an entire lot, is adverse to the rightful owner, though tenant in common with the grantor.

It is next objected that Nancy Brown's title is still outstanding. What has been said with respect to James's right applies to hers. The case of Nancy Brown is much stronger, for there is a conveyance of twenty-five years standing, reciting that she had conveyed to George and William Brown; and it is very unsound reasoning to contend that the purchaser is bound by that, as an estoppel, to deny her right. So far from that, the presumption is such conveyance actually existed. It was but an improvement right, abandoned for more than thirty years. A patent from the land-office of twenty-five years; such a recital, accompanied with possession to support it, and such dereliction of the incipient right: 4 Binn. 231, is some evidence to account for the abandonment, which of itself, unaccounted for by infancy or coverture, would at least be sufficient in a case like this, where the party himself does not even now set up a claim, and where this stale claim is ferreted out by a third person, to prevent the recovery of the purchase-money of the land, which he continues to enjoy undisturbed.

Thus we have disposed of the first, fourth and fifth specifications of error. The second and third are in fact the same. I cannot assent to the doctrine of the court of common pleas, that, where the husband conveys without his wife's joining, that the statute of limitations runs during the coverture. If the entry and possession had been adverse to the husband's right, and his right of entry had been barred by the statute of limitations, the widow's dower would have been barred. Our act of limitations comprehends as well all possessory actions as all real actions; but here the entry was not adverse to the right of

the husband. All was a continuation of the same inheritance, and, therefore, the statute would not begin to run until the death of the husband, as, if the husband levy a fine of his land, with proclamations, and die, his wife is bound to make her claim within five years after his death, otherwise she shall be debarred of her dower, for her estate was not consummate at the time of the fine levied, or until her husband's death. The fine begins to work presently after the death of the husband: 8 Inst. 216; 2 Co. 93; 10 Id. 49, 99; Hob. 265.

So here, the statute of limitations begins to work at the death of the husband. But where the husband's right is barred by an adverse possession, there the possession for twenty-one years gives a title to the adverse possessor. And where one enters under the right of the husband, the wife's right being created by the marriage and seisin, the seisin is not so disturbed as to make it adverse to the widow's right of dower, until the right is consummated by the husband's death, when the right of action first accrues. The limitation act of the twenty-sixth of March, 1785, is so comprehensive in its terms: "Nor shall any person have or maintain any writ of right, or any other real or possessory writ of action," that I can not doubt of the intention of the legislature to provide against every action and every right of entry where there had not been a seisin within twenty-one years next before such writ, where the possession had been taken and continued under an adverse right; for the fee is acquired by such adverse possession, and becomes a title paramount to the husband's. But the law is different where the tenant holds by conveyance from the husband; for the rule of possession is, that where a person comes to the possession of land by his own agreement, and holds that possession, he, and all those claiming under him, must hold it according to the right of that possession, and can not qualify it by any other right.

So small an interest as the widow of George Brown would have in the premises, and who is represented as a frail woman, of seventy years of age, would not, perhaps, go for much in the estimation of any jury; and when it is to be supposed that this old lady never imagined she had any such right, or, if she did, that it was so insignificant as not to be worth her pursuit, makes it a subject of regret with the court to reverse this judgment; as they can not but say that it is a matter seized hold of as an expedient to delay the recovery of a just debt. But small as it is, the court of common pleas fell into error by not distinguish-

ing a possession under a claim adverse to the husband's title, which twenty-one years' possession would make a title paramount, from a possession held by a conveyance under the husband's right, which was a continuation of the same inheritance from which the widow claimed her dower; and it is for this error alone the judgment is reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

oust by Co-Tenant.—See on this subject the note to *Gillaspie v. Osburn*, 13 Am. Dec. 140. The doctrine of the principal case on this point is approved in *Law v. Patterson*, 1 Watts & S. 191; *Dikeman v. Parrish*, 6 Pa. St. 225; *Miller v. Miller*, 60 Id. 22.

As to disseisin of a husband and wife, the principal case is cited in *Rankin v. Tenbrook*, 6 Watts, 391.

FUHRMAN v. LOUDON.

[13 SERGEANT & RAWLE, 386.]

ACKNOWLEDGMENT OF DEED purporting to be taken in — county, before John Adams, justice of the peace of said county, is valid where, in the body of the deed, the county in which the grantors resided is named.

INCUMBRANCES KNOWN to vendor and vendee at the time of the sale, and provided against by a covenant of warranty in the deed, constitute no ground of defense to an action for the purchase price.

EVIDENCE showing that a testator who has long been dead left considerable personal property is admissible to raise a presumption that legacies charged upon his real and personal estate have been paid.

ERROR to the common pleas. The opinion states the case.

Metzger and Carothers, for the plaintiff in error.

Wadsworth and Mahon, for the defendant in error.

By Court, TILGHMAN, C. J. This is an action of debt, on three bonds given by Jacob Fuhrman, the plaintiff in error, who was defendant below, to Henry Loudon, the plaintiff. These bonds were given to secure the purchase-money of a tract of land sold by the plaintiff to Jacob Roop, from whom the defendant purchased, it having been agreed by all the parties interested that the defendant, instead of giving his bonds to Roop, should give them to the plaintiff. The defendant, having pleaded payment with leave to give the special matters in evidence, rested his defense principally on two points: 1. That the land which he had purchased was liable to the dower of Jacob Roop's wife; 2. That the said land was liable to the payment

of certain legacies charged on it by the will of William Loudon, deceased, father of the plaintiff.

In order to show that no right of dower was outstanding, the plaintiff produced a deed from Roop and wife, acknowledged before John Adams, styling himself a justice of the peace, to which the defendant's counsel objected because it was not said, in the certificate of the acknowledgment, of what county or state Adams was a justice. But the court overruled the objection and admitted the deed in evidence. The certificate was headed, — county, ss., and then went on to say: "Before me, one of the justices of the peace for the said county, personally came the above-named Jacob Roop and Susanna, his wife, and acknowledged the above indenture," etc., etc. Now, it would seem that the words "for the said county" were intended to refer to the county mentioned in the deed, because, in another part of the certificate, where it is said that the above-named Jacob Roop and Susanna, his wife, appeared before the justice, reference must certainly have been intended to the body of the deed, no mention of Roop and wife having been previously made in any other place. The exception is not to be favored, as it can not be seriously supposed that Adams would have undertaken to receive the acknowledgment of a deed relating to lands in Pennsylvania if he had not been a justice of the peace for some county in the state, and if a justice for any county, it was sufficient. At the time of taking this acknowledgment any justice of the peace was authorized to take the acknowledgment of a deed affecting lands in any part of the state. I am of opinion, therefore, that the exception was not good, and the deed was properly admitted in evidence.

2. The next error is of a more substantial nature. The defendant says that he ought not to be compelled to pay his bonds, because the land which he purchased, and for which these bonds were given, is liable to the payment of certain legacies charged on it by the plaintiff's father. The court below were requested to charge the jury to this effect. The charge was substantially as follows: That, in general, where a bond is given for the purchase-money of land, and before payment it is discovered that there are incumbrances existing, the plaintiff can not recover without deducting the amount of the incumbrances, although he has made a conveyance to the defendant with general warranty; but that, where the incumbrances, with all the circumstances attending them, are known both by the vendor and vendee, and the vendee takes from the vendor a deed, warranting

particularly against these incumbrances, and gives his bond for the purchase-money, it is no defense against an action on the bond to say that the incumbrances are still existing. And the court left it to the jury to determine whether both parties in the present case knew of the legacies charged on the land, and whether any circumstance had occurred rendering the situation of the defendant more perilous than it was when he gave his bonds.

I see nothing to find fault with in this charge. The plaintiff's warranty certainly referred to these legacies; it was against the plaintiff himself and his heirs, "and each and all of the heirs of his deceased father, and his and their heirs, and against all and every other person." The legacies were given to some of the heirs of the father, and no doubt it must have been known to the defendant that they were charged on the land, because the land which he was purchasing came to the plaintiff (the vendor), by his father's will, and when the defendant was examining the title-papers the legacies and the charge stared him full in the face. Then how does the defendant stand before the court? He asks equity. The plaintiff has no equity to ask; he sues on the defendant's bond which has been forfeited at law. But what equity is there in the defendant's case? He purchased a tract of land which he knew to be burdened with the payment of legacies; he secured himself against these legacies by a warranty taken for the very purpose. He reserved a conveyance of the land, and passed his bonds for the purchase-money. Thirteen years elapsed from the death of William Loudon, by whose will the charge was created, to the time of commencing this suit. The defendant has never been molested by the legatee, and yet he complains that he should be called upon to pay his bonds, because, possibly, he may be molested hereafter. It really does appear to me that there is no foundation for this complaint, and that by refusing payment the defendant is violating the fair meaning of his agreement. If the incumbrance had been unknown when the bonds were given, the case would have been very different, even though the plaintiff's deed of conveyance had contained a clause of general warranty. He would then have been protected by the principles established in *Steinhauer v. Witman*, 1 Serg. & R. 438, 447. But upon the facts exhibited in the present case the charge of the court was correct.

An exception was taken to the evidence of Robert Buchanan, who proved that William Loudon, father of the plaintiff, died possessed of considerable personal property. I think it was good evidence, being a circumstance affording some little pre-

sumption, that the legacies might have been paid. It is unnecessary, however, to say anything more on this point, as I understand that it was abandoned after the argument. The judgment is to be affirmed.

Judgment affirmed.

CITED ON THE FOLLOWING POINTS: That a purchaser of land having knowledge of a flaw in the title, and neglecting to take covenants against it assumes the risk of it, and that if, having such knowledge, he takes covenants against the defect, he must rely upon them: *Lighty v. Shorb*, 3 Pa. 452; *Beedelman v. Foulk*, 5 Watts, 311; *Wilson v. Cochran*, 48 Pa. St. 111; but see *Fellows v. Jeter*, 3 Phila. 134; that where a purchaser takes covenants to cover a defect the implication of knowledge of such defect is irresistible: *Murphy v. Richardson*, 28 Pa. St. 293; that a manifest failure of consideration growing out of a defect of title not known at the time of the purchase, is a good defense in debt on a bond for the purchase-money, or to a *scire facias*, or an ejectment on a mortgage: *Goucher v. Helmbold*, 1 Miles, 411; *Ludwick v. Huntzinger*, 5 Watts & S. 58, and see *Share v. Anderson*, 10 Am. Dec. 421; and that where defects are discovered in the title before payment of the purchase-money the purchaser has a right to withhold enough to cover those defects, or in case of eviction to deduct his damages from the purchase-money: *Wilson v. Cochran*, 46 Pa. St. 231.

ACKNOWLEDGMENTS, SUFFICIENCY OF.—As to acknowledgments by *femea-covert*, see *Webster v. Hall*, 1 Am. Dec. 370; *Hollingsworth v. McDonald*, 3 Id. 545; *McIntire v. Ward*, 6 Id. 417; *Shaller v. Brand*, Id. 482; *Evans v. Commonwealth*, 8 Id. 711; *Watson v. Mercer*, 9 Id. 411. Respecting the invalidity of an acknowledgment taken out of the jurisdiction of the officer, see *Gittings v. Hall*, 2 Am. Dec. 502; *Share v. Anderson*, 10 Id. 421. As to the conclusiveness of a certificate of acknowledgment, and the admissibility of parol evidence affecting it, see *Smith v. Ward*, 1 Am. Dec. 80, and the note thereto; and *Watson v. Bailey*, 2 Id. 462.

FAILURE OF TITLE AS GROUND OF RELIEF.—On this point see the note to *Abbott v. Allen*, 7 Am. Dec. 558, and *Barkhamstead v. Case*, 13 Id. 92, and the note thereto.

CASES
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

ASSIGNEES OF HULL *v.* CONNOLLY.

[8 McCord, 6.]

CONTRACT FOR THE PURCHASE of goods for two may be for their equal, without being for their joint benefit.

CONTRACT MADE BY AN INFANT AND AN ADULT is binding on the latter only, against whom alone an action can be sustained.

INFANT'S CONTRACT FOR NECESSARIES can not be enforced if he was living with and properly maintained by his parents, or either of them. In such case the parent is presumed to be a proper judge of what is necessary for the infant.

MOTION for a new trial. The cause was submitted on the recorder's report, in an action brought by the assignees of Hull against Mary and Martha Connolly. One of the defendants was an infant. The sale and delivery of the goods, the subject-matter of the action, was proved, and plaintiffs contended that the articles were necessities suited to the station of the infant defendant. The recorder decreed in favor of the plaintiffs deducting the value of such articles as were not necessities, in his opinion.

The defendants' motion was made on the grounds, that: 1. The action was brought on a joint contract, one of the defendants was an infant, and the evidence did not prove that the articles sold were necessities; 2. The decree was contrary to law and the weight of evidence.

Bailey, Ford and Desaussure, for the motion.

Dunkin, *contra*.

NORR, J. The court concur with the recorder in the general

view which he has taken of this case. But a question has arisen in the course of the argument which was not made in the court below, on which it has become necessary to express an opinion and which will lead to a different result. This appears to be a joint contract for the equal benefit of both the defendants. But it cannot be for their joint benefit, because the articles are of such a nature as to inure to the separate use of each. The effect of the decree will be to make each liable for the whole. The articles intended for the elder sister could not be necessary for the younger, who was under age. As it regards her, therefore, the contract was voidable under the plea. Indeed, it is laid down that if a contract is made by an infant and an adult they cannot both be sued thereon, but the action should be brought against the adult only, as being the sole contracting party in point of law: 1 Com. on Con. 152, 166; 3 Esp. 76; 4 Taun. 468; 5 Esp. 47; 5 Johns. 160; 1 Wils. 90; 1 Saund. 207.

There is another difficulty in this case which, in all probability, it will not be easy to surmount. The defendants were living with their mother at the time this contract was entered into. And it appears to be a pretty well settled principle that an infant who lives with and is properly maintained by her parents cannot bind herself to a stranger for necessaries: 1 Com. on Con. 144, 156, 157; 2 Bl. 1325; 1 Esp. 211. Whether the mother in this instance was able and did maintain her daughters in a manner suitable to their condition did not appear, but it ought to be presumed until the contrary be proved; for although the mother is not considered as the natural guardian of her children to the same extent as her father, yet she has an interest in their welfare which renders her the fittest judge of those things, and particularly in the articles of clothing which are necessary for their convenience and comfort. It would have a most unfortunate tendency to permit daughters during their minority to indulge those extravagant notions which too many at that age entertain of what is necessary for them, unaided by the salutary advice and control of their mothers. The plaintiff might have inquired into their circumstances and consulted the mother before he suffered the debt to be contracted. Evidence may, perhaps, be offered on another trial to make the case an exception to the general rule; but a new trial must now be granted.

GALPIN v. FISHBURNE.

[3 McCORD, 22.]

NUNC PRO TUNC entry of judgment, after a year and a day, will be granted or refused at the discretion of the court. It will be refused unless: 1. Good reason for the delay is shown; and, 2. The rights of strangers shall not be affected.

APPEAL. It appeared that Charles Fishburne had confessed judgment in his life-time in favor of the plaintiff. The judgment had not been signed, nor entered up, nor had any proceedings been taken subsequent to the confession. Two years and some months after the confession of the judgment, the plaintiff obtained an order against the defendant, administrator of Charles Fishburne, to show cause why the judgment should not be signed *nunc pro tunc*. The defendant showed cause that his intestate had been dead for two years; that in marshaling the assets of the estate he had no notice of the judgment, and, therefore, to suffer the plaintiff to enter up judgment *nunc pro tunc* would give an undue preference to that judgment, or make him liable to a *devastavit*, or both.

The order having been made absolute, the defendant appealed and moved the court of appeals to set aside the same.

Ellmore and Martin, for the motion.

Clark, contra, in support of the ruling of the court below, cited 1 Dunlap's Pr. 357; 1 Cai. 498; 6 Johns. 325; 2 Tidd Pr. 846; 6 T. R. 6; 2 Ld. Raym. 766, 849; *Lynch v. Bay*, 1 Bay, 444.

COLCOCK, J. Every application to the court for leave to enter up judgment *nunc pro tunc*, after the year and day, is an application to the discretion of the court, and the court will be satisfied: 1. That there was some good reason for the delay; and, 2. That the rights of others shall not be affected before they grant the leave. In the case before us, no satisfactory reason is shown why the plaintiff did not proceed. The defendant lived fifteen months after the confession, which embraced two terms, and two years and some months after his death were suffered to elapse before any application is made. The court will lend its aid to advance the purposes of justice, where the party applying has used due diligence; but it is never disposed to assist one out of a difficulty, which is the result of his negligence. But this is not all; the plaintiff not only asks the court to secure to him those rights which he may have lost by his own negligence, but to give him a preference over others who may have been diligent

in the pursuit of their rights, which they would not do under any circumstances.

The counsel for the plaintiff lay down the position that a confession of judgment was final and does not abate, and referred to some authorities which support the position; but it is only in such cases and those provided for by the statute of Charles II, that such an application as the present one can be made. The general rule of law is, that the death of a sole plaintiff or defendant, before final judgment, abates the suit: 2 Tidd Pr. 845, 846. Again, I think in a case like the present, the court would not suffer a judgment to be entered up after the death of the defendant. The proceeding is uncertain and wholly irregular. It is not like the case of a *cognovit actionem* regularly entered on the record. The defendant, on the back of a writ, confessed judgment for so much on the case. What case? Was it on a note or an account? And what note or account? How would the record be made up? It is manifest that in such case the plaintiff might use any cause of action of that amount. What could there be which would prevent the plaintiff from making out an account for the sum for which judgment was confessed, and then suing the executor or administrator on the note, on which it was intended to confess the judgment?

On the whole, there has been so much negligence, and so much irregularity in the proceeding, that the court feel constrained to grant the motion for the reversal of the judgment below.

HAYWARD v. MIDDLETON.

[3 McCord, 121.]

A USAGE, to be binding, must be of long standing, uniform in operation, just and reasonable, and known to and acquiesced in by all those whose rights are affected by it.

THE CONSIGNOR IS LIABLE FOR FREIGHT.—The carrier is not bound to look to the consignee nor to the consignor's factor.

ASSUMPSIT to recover the freightage of certain packages of rice carried from defendant's plantation to the city in plaintiff's vessel. The carrying was proved. The defendant resisted a recovery on the ground of a usage prevailing in Charlestown making the factor of the consignor alone liable; and for the further reason, that if the evidence should establish that both the consignor and factor were liable, he was discharged because the plaintiff had elected to apply in the first instance to the

factor. The evidence regarding the alleged usage appears from the opinion.

Verdict for the defendant, and motion to set aside the same, and for a new trial.

Ford and Desaussure, for the motion.

Holmes, contra.

COLLOCK, J. In considering the first ground taken for a new trial in this case, it would seem to be a work of supererogation to do more than refer to the numerous opinions of the court, as stated in 1 Cons. 186, where the court have determined that the consignor is liable. But as the counsel for the respondent has undertaken to controvert that opinion, and has adduced authorities which are said to be opposed to it, it may not be amiss to show that the decision of this court is supported by the concurrent opinion of all the elementary writers on the subject, and by the very cases which the counsel has relied on.

The first position taken is, that the consignee is liable; and next, that two can not be liable. The first will not be denied. The consignee is often liable, perhaps, it may be said, in nine cases out of ten; but that does not prove that the consignor is not also liable. The second position can not be supported. Indeed, the converse of it is true. In commercial transactions, nothing is more common and frequent than that there should be two, three, and sometimes a dozen persons, all of whom are liable. As in a case of a bill of exchange, or note indorsed by different persons. Contracts for freight arise in two ways: first, by charter-party, as where a merchant hires a ship for his sole use, lades her, and sends her to a particular port; next, by putting the goods on board, and taking from the captain a bill of lading, as is the case with those vessels which are called general vessels; that is, such as carry goods for all and any person who may put them on board. And when the course of trade is well known, the parties acquainted with each other, and the distance to which the goods are to be sent is not great, as in the case before us, it is not uncommon to place the goods on board without any bill of lading; in which case, the contract is to be regulated by the well established law on the subject. By receiving the goods, the ship-owner contracts to carry safely, and to deliver according to the verbal directions he receives. Now, if we resort to just principles, I take it that no one is better established than that he who employs another to perform a service for him is liable to pay him a reasonable compensation

for his labor. Why should not the rule apply in this case? It is answered, because the goods are liable for freight, and the carrier might have paid himself; and again, because when he delivered the goods to the consignees he made them his agents. Now, the amount of this is, that if a man gives up one of his securities he abandons them all. There is, to be sure, a strict technical rule of that sort which relates to joint-obligors, but this is certainly the first time that it was ever attempted to be applied to cases of this kind. When it is conceded that the goods are liable, and that the consignee may become so by receiving the goods, it does not follow that the consignor would be exempt in cases of loss. For who reposes the confidence in the consignee? Not the carrier, for he is directed to deliver the goods to the consignee, and undertakes to do so. For the most part, he is a stranger to him. Now, it is a well established rule that if one of two innocent persons must suffer, he who reposes the confidence, and thereby has occasioned the loss, must bear it. In *Abbott on Shipping*, 241, the author, when contrasting the opinions of Valin and Pothier, the former of whom contends that the goods alone ought to be liable for the freight, remarks that "in addition to what Pothier says in answer to this, it may be proper to observe that the argument of Valin seems to prove too much; for if the goods are to be the only security for the freight, and the merchant ought not to pay the freight, if they are not worth the amount of it, the master and owners must lose the freight if the goods happen from any accident to come to a bad market; which is contrary to all law and reason. And further, that the foundation of the argument does not apply to this country, by the law of which, although the goods are pledged for the freight, yet the merchant, also, is personally responsible for it."

But it was contended that the usage existed in Charleston, whereby the common law liability of the consignor was shifted to the consignee, and on this ground the verdict of the jury was, no doubt, founded. Before I proceed to examine the testimony, I lay it down as an established doctrine that a usage, to affect this purpose, must be of long standing, general in its operation, and known to and acquiesced in by all whose rights are affected by it, and also just and reasonable in its operation. Upon an attentive examination of the testimony, it will be found to be, in fact, no more than proof of that liability which the law itself imposes on consignees who receive goods. For, without exception, all the witnesses stated that they deduct the freight out of

the consignor's produce, and that the carrier often waits until the produce is sold, though they sometimes pay the freight before it is sold. As this is a case which has been long depending in our court, and has excited some interest, I shall be excused in giving a brief analysis of the evidence.

The first witness, Mr. Simons, says the usage has existed for forty years past, as long as he could recollect, to look to the factor as debtor for the freight. But he adds that he knows of no case in which the captain applied to the planter when the factor became insolvent, nor of any case where the planter settled the freight himself. Now, his calling that usage which is law can not alter the nature of the responsibility, and if it could produce any such effect, does the proof of a liability in the factor remove that of a planter; above all, when he says that he knows of no instance in which the matter has been questioned? Does he not negative all idea of usage, though he may express his own opinion? Mr. Kershaw, the next witness, says: "When he received produce for sale, he considered himself liable for freight. He never looked to the planters and has lost freight. He knows of no case of the planters being applied to. He should suppose planters were not liable." Here, again, is mere opinion without any case to support it. Mr. Minott, the next witness, expresses only his own opinion. He knows of no case, and, in addition to this, has been only three years a factor.

The next witness, Mr. Gadsden, who was one of the defendant's factors, states a very strong opinion on the subject: "The usage was to look to the factor. He did not know an instance to the contrary. He owned several vessels and always debited the factor and lost freight by factors, but never called on the planter." Here it is observed also, the witness gives only his opinion. He, like Mr. Simons, knows of no case in which the planter was called on and refused, or was sued for the freight. He did not call on the planter, because he believed him not liable; but this is mere opinion, and not such evidence as is necessary to establish a point of such primary importance. The next witness, Mr. Mazyck states that "he knows nothing of such a custom, though he has been in business for twenty-nine years. He knows instances of the planters paying freight." This testimony is against the usage. Mr. White, the next witness, says: "The factor is responsible, except in some cases; never knew an instance of the planter's being called on for freight. He thinks that if both factor and planter were charged in the account for freight, both would be liable."

Here is an opinion founded on the mere fact of making the charge against both, which can certainly have no effect; and in another part of his evidence, he says, "he is not required by the usage of trade to confine his charge against the factor;" which certainly strikes at the usage itself. The next witness, Mr. De Liesseline, speaks "of his own usage, as he calls it, which is to look to the factor and not the planter. He has known the captain to complain to the planter that the factor did not pay." He then proves no custom. I remark then, in the first place, that all these witnesses are factors. Mr. White disproves the usage; Mr. Mazyck knows nothing of it; Mr. De Liesseline confines it to himself; Mr. Mynott has been only three years in business. The proof of the usage then rests on the evidence of Messrs. Simons, Kershaw and Gadsden; all of whom say, they know of no reasons and give only their opinion. Now, if the common law is to be overruled in this way, any eight or ten respectable citizens, engaged in the same pursuit, might legislate for a community. Suppose a dozen merchants in this city should say that it had been a usage with them, as we all know it has been, to charge goods delivered to an executor or administrator to the estate which they represent, would this court hold that, therefore, they should be permitted to recover judgment which would bind the estate? Or, to take the case put by the plaintiff's counsel, suppose they should say that a dormant partner was not liable on the note of the principal of the house, would he, therefore, be exempt? To establish a usage, some instances of an acquiescence in that usage by those whose rights are affected, are indispensably necessary. Now, not a single instance has been given of a carrier agreeing to lose his freight by virtue of the usage. Some time ago, the common carriers in London attempted to claim a lien on goods for their general balances, and endeavored to establish a usage. But what was the language of the judge in those cases; although they proved several instances, and one as old as thirty years, in which it had been done and acquiesced in. Lord Ellenborough said: "It is too much to say that there has been a general acquiescence in this claim of the carrier since 1775, merely because there was a particular instance of it at that time; other instances were only ten or twelve years back, and some of them of very recent date." Still, there were instances. And again: "It must be admitted that this claim is against the general law of the land, and the proof of it is therefore to be regarded with jealousy:" *Rushford v. Hadfield*, 7 East,

228. I have said that the usage must be just and reasonable, and this, in its general operation. Now, this practice is very convenient to the factors, and as to them, it is also just and reasonable; for they receive out of the produce what they pay; and when they speak of having lost freight, it must be understood that they have lost it when acting as agents for ship-owners, or as ship-owners, which is only proof of the operations of their own opinions as to themselves.

But can it be considered as just in relation to the carrier? The foundation of the claim to exemption on the part of the consignor is that the goods are liable for freight as well as the consignee when he receives them. But when we consider the nature of the business of the carrier and his undertaking, which is to deliver the goods to the consignee, it is perceived he is obliged at last to trust the consignee. Does it comport with the nature of his occupation to be selling out so much of the cargo as will pay the freight, or to lie in port until the consignee can sell? If he were obliged to do so, that which was intended as a benefit, would, in most cases, prove an injury. When it is said, therefore, that these means of payment are offered him, no more is meant than that he may under circumstances resort to them. But if they fail, then the original obligation of the consignor attaches, and from him compensation may be received. If one should contract a debt with the owner of a livery stable for the keeping of his horse and on riding him out he should die, would it not be unjust that the one should refuse to pay for the keeping of his horse, on the ground that the other had a right to detain him until he was paid, and that he had parted with his lien? I refer now to the cases relied on by the counsel for the respondent.

The first is the case of *Davis v. James*, an action against a common carrier by the consignor: Burr. 2680, to which it was objected that having parted with his goods, he could not maintain the action, but the action should have been brought in the name of the consignee, to which Lord Mansfield said: "There was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstances of cases; but it does not enter into the present question. This is an action between the plaintiff and the carrier. The plaintiff was to pay him, therefore the action is properly brought," etc. Now this does not prove that the consignor is not liable for the freight; for in this statement of the case, it is said he actually paid the freight. The next was the case of *Moore and others v.*

Wilson, 1 T. R. 659. This was also an action against a common carrier for not carrying the goods safely. The declaration stated that the defendant undertook to carry the goods "for a certain hire and reward to be paid by the plaintiffs." It was proved at the trial that Clark, the consignee, had agreed with the plaintiffs to pay the carriage of the goods, which the defendant's counsel contended, did not prove the declaration; and Buller, J., before whom the cause was tried, at Guildhall, being of that opinion, nonsuited the plaintiffs. But on a rule to show cause why the nonsuit should not be set aside, Buller said: "That on considering the question, he found that he had been mistaken in point of law; for that whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable;" and the other judges concurred. Now this case, so far from impugning the decision of this court, is directly in point to support it. To these I add the only case in which it was ever doubted, as far as my present investigation and research enable me to decide, that the consignor was liable for freight when that was the direct question in the case. It shows not only what the law is on that point, but also that which is called usage is established law. The case is that of *Penrose et al v. Wilks*, tried before Lord Kenyon in 1790. It was an action for freight on a charter-party, by which the goods were to be delivered in London, agreeably to the bills of lading, to a third person on his paying freight. They were delivered to him and he refused to pay the freight, because the merchant, the defendant, who was the consignor, was indebted to him to a greater amount. Lord Kenyon held that the freight could not be recovered of the consignee; because the master ought not, by the terms of the contract, to have delivered the goods without receiving the freight from the consignee. But this opinion of his lordship was overruled in the king's bench, and a new trial ordered, at which the plaintiff succeeded. If a consignee receive goods in pursuance of the usual bill of lading, by which it is expressed that he is to pay freight, he, by such receipt, makes himself debtor for the freight, and may be sued for it: *Abbott*, 415.

Upon the whole, then, no usage having been proved, and the law being well established that the consignor is liable, the motion is granted.

TURNBULL v. RIVERS.

[3 McCord, 131.]

PRESUMPTION OF GRANT OF RIGHT OF WAY does not arise until there has been an uninterrupted use for twenty years, acquiesced in by the owner of the land. The way claimed must be definitely located; no right can be acquired by passing, in common with other neighbors, over uninclosed land, the routes used being changed with every change of fields and fences at the will of the owner.

WAY OF NECESSITY.—The necessity from which a grantee derives a right of way is, when the lands purchased are surrounded on all sides by the lands of the grantor. If the land can be reached by water, or by a distant or difficult road, the grantee is not entitled to a way across lands of the grantor; for it is necessity, and not inconvenience, that gives the right.

NEW TRIAL TOTIES QUOTIES will be granted if the verdict is contrary to law, or when there is no evidence to support it.

TRESPASS for obstructing a way. The plaintiff claimed a right of way across defendant's land, called Stent's point, to plaintiff's island, called Goat island. The evidence offered in the cause is reviewed in the opinion of Judge Nott. The jury found for the plaintiff. A motion was then made to set aside the verdict and for leave to enter a nonsuit, or, if that be refused, for a new trial.

Pringleau and Petigru, for the motion, relied upon *Lawton v. Rivers*, 2 McCord, 445 [13 Am. Dec. 741].

Grimke and Hunt, contra.

NOTT, J. The law in relation to cases of this sort is so fully laid down in the case of *Lawton v. Rivers*, 2 McCord, 435 [13 Am. Dec. 741], that it will be sufficient to refer to that case for the general principles by which this must be governed. The court are satisfied that the plaintiff was not entitled to recover either on the ground of a grant or prescription. No grant was produced; no evidence of the existence of one could be inferred. In order to presume a grant, uninterrupted use for at least twenty years was necessary. And the identity of the road should have been established. But no such evidence was adduced. The island had been cultivated before the revolution; but by whom, or by what authority, or for what length of time, did not appear. Littlejohn planted it one year, by mistake, about twenty years ago, and then abandoned it. After him, but in what year it is not ascertained, one Gibbs planted it, as the overseer of Stanyard; whether he stayed more than one year is quite uncertain. And that is all the occupation that was proved of the island, until the year

1810, when it was purchased by the plaintiff. I can not discover, from the report of the presiding judge, at what time the plaintiff entered into possession; nor does it appear that he cultivated it more than one year. It is, however, unimportant; for it was not long before the defendant inclosed the land and shut up the way, which was the obstruction for which this action was brought.

But all the testimony relative to the occupation of the island is unimportant evidence of the use of the road; and admitting the use to have been co-extensive with the occupation of the island, it would not give to the plaintiff a prescriptive right, much less is he authorized to set up any such right from the evidence offered on this occasion. It amounts to no more than this, viz.: The several occupants of the island were permitted to pass over the uninclosed lands of the defendant in the same manner, and to the same extent, as all the rest of the neighbors; and the way was changed with every change of the fields and fences, according to the arbitrary will of the owners of the land. Allowing the use of the way appears to have been a mere act of courtesy; and there was no such identity of way proved, no such continued use by the plaintiff, or those under whom he claimed, nor such acquiescence on the part of the defendant, as could be construed into a right. The whole case, then, resolves itself into the question whether the plaintiff is entitled to a right of way from necessity. The necessity by which a person derives a right of way is when one person sells to another lands inclosed on all sides by other lands. Here the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land: *Pernam v. Wead*, 2 Mass. 203 [3 Am. Dec. 43]; 6 Jac. L. Dict., tit. Way; *Houton v. Frearson*, 8 T. R. 50; *Pomfret v. Bicroft*, 1 Saund. 323. This is also said to be a right by grant, because the law implies a tacit consent on the part of the seller that the purchaser shall have free ingress and egress to and from the land so situated. But there is no evidence that Goat island was ever owned by the owners of Stent's point; nor am I aware that it would strengthen the plaintiff's claim if the fact were so. The right in such a case must arise from necessity. If, therefore, a person owns land lying between two roads, one on the east and the other on the west, and shall sell that lying on the west, it gives to the purchaser no right of way across his land to the road bounding him on the east, whatever may be the distance or the difficulty of getting to that road. Such a way might be convenient, but there would be no such necessity as would

impose upon the owner of the land an obligation to afford him such an accommodation.

In analogy with that case, suppose one person should sell to another the extreme point of a neck or tongue of land surrounded by an open sea or navigable streams, except on one side, would it be understood that the seller should allow him a right of way through the whole neck of land because it might sometimes be more convenient for him to go to his farm by land than by water? I should apprehend not. Much less would he have a right to demand such a privilege from the owners of the adjacent land, who were not parties to the contract. To bring the case more distinctly under our view, let us suppose James island to be the tongue of land now spoken of. A person residing in Charleston, at Haddril's point or on Sullivan's island, would never expect a right of way to the main land on the west through all the intervening plantations, merely because his farm was inaccessible by land in any other direction. The inconvenience of going always by water to his farm would not amount to such a necessity as would entitle him to such a privilege. If under those circumstances he would not be entitled to such a favor, could he entitle himself to it by purchasing another farm on the west end of the island. A direct intercourse between the two places so situated would be vastly convenient, but that convenience would confer no right. Now, that is the case immediately under our consideration. Goat island is accessible by water in every direction except on the side from which the plaintiff claims a right of way. It is nothing more, therefore, than a matter of convenience, and not of necessity; and if the plaintiff were situated in any other direction from the island, perhaps he would hardly consider such a way as a convenience. This way, then, becomes important to him merely on account of the relative situation of the two places, and comes precisely within the principle of a necessity created by the party himself, which can furnish no ground of right: 1 Saund. 323, n. 6. There is no evidence, therefore, which could entitle the plaintiff to a verdict on either ground.

It only remains, then, to be determined whether the court shall grant a nonsuit or new trial. It is not conceived that the trial by jury is of so little value as the counsel for the defendant seems to imagine. It is one of the greatest privileges which a free people can enjoy, and independent of its real and intrinsic value, it derives additional importance from the inestimable value which the people themselves imagine it

possesses. The court feel no disposition, therefore, to trench upon the right of the jury; and if there were any evidence which could be submitted to their consideration, a new trial would be granted. But it is equally the duty of the court to preserve the bounds of jurisdiction between the court and jury; and it would be as much a usurpation in the jury to undertake the exposition of the law as of the court to take from them the trial of the facts. Wherever, therefore, there is any conflicting evidence, a new trial will be granted. But when every point submitted is a conclusion of law which it belongs exclusively to the court to make, and where it appears manifest that better evidence cannot be obtained, it would be tantalizing the parties to send them back for another trial. It was a maxim of the civil law that that is the worst of slavery, where the law is either vague or uncertain. And it is equally true in this country. The court will therefore grant a new trial *toties quoties* where the verdict is contrary to law; and when there is no evidence on which the jury can find a verdict, and the case is brought before the court in such a shape that it can put an end to unprofitable litigation by a nonsuit, that course ought to be pursued.

In this case there was not a scintilla of evidence to authorize a verdict for the plaintiff. A nonsuit ought to have been granted in the court below, and is therefore now ordered by this court.

BARNSTINE v. EGGART.

[3 McCord, 162.]

PROMISE TO PAY DEBT OF ANOTHER is valid, although the promisor derives no advantage or benefit; it is sufficient that the promisee suffers a damage, or forbears to prosecute a claim, or delays an arrest of the debtor.

ASSUMPSIT on a written promise of the defendant to pay to the plaintiff the amount of a certain execution, issued in his favor against one Schwach, "on condition that the defendant have indulgence for two weeks." It appeared that Schwach had been released under the execution for the period of sixty days, and was about to be seized again, when the writing declared on was executed, and Schwach permitted to go at large.

Motion for a nonsuit or new trial.

Pepon, for the motion.

J. B. White, contra.

JOHNSON, J. There is obviously nothing illegal in this contract, and the only question growing out of the first ground of the motion is, whether there was a sufficient consideration to charge the defendant. Every promise that is made without a consideration is *nudum pactum*, and, it follows, as a necessary consequence, that to make them obligatory there must be a sufficient legal consideration. It is not, however, necessary to their validity that the party to be charged by them should derive a benefit; if it be a damage to the other party, or a suspension or forbearance of his right, it is sufficient: 3 Burr. 1663; 1 Taun. 523. And so if the contract imports a benefit to the person for whom the thing is to be done: 1 T. R. 76. Assuming for the present, that the plaintiff could legally have arrested Schwach on the *ca. sa.*, at the time the contract was entered into, it will be found that both of these ingredients entered into the consideration. It was to the damage of the plaintiff. He was to be delayed in the collection of his debt. Schwach might have escaped, and his remedy against him might have been lost. It imparted a benefit to Schwach, for whom the thing was to be done. He was for the time discharged from the arrest and detention of his person. In support of this ground, it has been urged that to make forbearance or indulgence a good consideration, it must be total, and not partial or temporary. This position is at war with those before laid down. The plaintiff was to sustain a damage, and Schwach was to derive a benefit, and the liability of the defendant attached. It is opposed, too, by numerous authorities. In 1 Roll. 27 and 15, it is laid down that to discharge a man arrested "for a little while," is a good consideration. Forbearance of a suit for "a certain time," is also good, and the reason given is that it is a present benefit to the defendant: Vide Cro. Eliz. 387, 643, 768, 848.

By the common law the discharge of a defendant arrested on a *ca. sa.* is a satisfaction of the judgment, and the second ground of the motion was founded on the idea that, inasmuch as the plaintiff did not retake Schwach at the expiration of the sixty days, the time limited by the discharge, he could not legally do so afterwards, and therefore the defendant's undertaking was without any consideration. If it be conceded that the plaintiff could not have again arrested Schwach on the *ca. sa.*, this conclusion would inevitably follow, but the act of 1815 has altered the common law in this respect. By it the plaintiff may discharge a defendant in custody on a *ca. sa.* for a time, with his consent, without impairing any of his rights, and he

may retake him. And if the construction contended for should prevail, it would follow that he could not do so, except the precise moment when the time limited had expired. He could not act before without violating the discharge, and, according to the doctrine, he could not act afterwards, so that a defendant would have it in his power, by keeping out of the way only for a moment, to discharge his debt. But if the discharge and the assent of Schwach is put on the footing of a contract, and it imposed on the plaintiff the necessity of retaking him immediately at the expiration of the time limited, it must, likewise, impose on him, for the same reasons, the obligation of returning to custody at the same time; and if he should fail to do so, on the principle that no one shall take advantage of his own wrong, the plaintiff might have retaken him at a subsequent time, and such is obviously the plain interpretation of the act. A different construction would make it a snare to entrap the innocent and unwary.

The motion is discharged.

COATE v. SPEER.

[3 McCord, 227.]

DECLARATIONS OF A DECEASED PERSON who was in a situation to possess the information are admissible on questions of boundary if made before the commencement of the suit.

TRESPASS to try title. The plaintiff's grant was the elder one, and if it covered the land in dispute he was entitled to a verdict. To close the grant by course and distance, it would not cover the premises in question. But the plaintiff contended that a certain gum tree was a corner of her grant, and if that were so her grant would cover a part, if not the whole, of the land. To prove that the gum tree was a corner, the plaintiff offered evidence that one William Golding, deceased, a chain-bearer at the time of the original survey, had said that the gum tree was the corner then made. This evidence was objected to on general principles, as well as for the reason that the declarations were made after the commencement of a suit between the present defendant and the plaintiff's devisor. The objection was overruled and a verdict found for the plaintiff.

The defendant moved for a new trial on the ground of error in admitting the evidence.

O'Neal and Johnson, for the motion.

Busket and Dunlap, contra.

COLCOCK, J. This case is put entirely on the ground that the declarations of Golding were inadmissible, and consequently that a new trial must be granted. It can not be doubted at this day that the declarations of deceased persons who shall appear to have been in a situation to possess the information, and are not interested, shall, on a question of boundary, be received in evidence. The exception, if made *post litem motam*, seems to have been also generally adopted, but could only have originated in that extreme caution which it was deemed necessary to observe in the application of a rule which is opposed to the general principles laid down on the subject of evidence. For if a man made false declarations with a view to affect a suit then pending, he must have also resolved on one of two things—either to die before the cause should be tried, so that his declarations might be given in evidence, or he must have determined to attend and perjure himself. Both are rather inconsistent with the nature of man. But when declarations made after suit brought are only a repetition of the same declarations made years before, the reason of the rule not applying, the rule itself can not apply. Golding's declarations to some of the witnesses were made after this suit was brought. But Chandler says he made the same declarations forty years ago, even before the defendant had obtained the grant under which he claims. They could not, of course, have been intended to produce any effect in this case.

The difficulty as to closing the lines was for the determination of the jury and was left to them. No rule on the subject has been violated that we are aware of, and therefore the verdict must stand.

The motion is dismissed.

HEARSAY EVIDENCE REGARDING BOUNDARIES.—The admissibility of hearsay evidence to establish ancient boundaries is confined in England to cases of a public nature, and is based on reasons of necessity: *Dunraven v. Llewellyn*, 15 Ad. & El. (N. S.) 791. 1 Greenl. Ev., sec. 145, in the text states that "though evidence of reputation is received in regard to the boundaries of parishes, manors, and the like, which are of public interest, and generally of remote antiquity, yet, by the weight of authority and upon better reason, such evidence is held inadmissible for the purpose of proving the boundary of a private estate when such boundary is not identical with another of a public or *quasi* public nature." In the note to this section, sundry decisions are referred to wherein a different rule has been laid down from that announced by the learned author, and an effort is made by the annotator of the edition, the thirteenth, to reconcile these adjudications with the English cases, which require some general interest to be involved in order to warrant the reception of hearsay testimony. With respect to the determination of boundaries where

public interest is concerned, the rule in this country is the same as that in England. It is defined as follows, in 1 Wharton on Ev., sec. 185: "On such public matters as boundaries of counties, and of municipalities, rights of common and public highways, the declarations of deceased ancient persons and old documents, each originating *ante litem motam*, or before a controversy had arisen for which such testimony could have been concocted, are admissible when the witnesses had peculiar means of knowing what was the ancient reputation as to the matters of which they speak." Judicial opinions supporting this proposition are: *Boardman v. Reed*, 6 Pet. 341; *Smith v. Forrest*, 49 N. H. 230; *Morse v. Emery*, Id. 239; *Hall v. Mayo*, 97 Mass. 416; *Long v. Colton*, 116 Id. 414; *Birmingham v. Anderson*, 40 Pa. St. 506; *Cox v. State*, 41 Tex. 1; *Beaty v. Hudson*, 9 Dana, 322.

In regard to the admissibility of traditionary evidence of boundaries where the rights of individuals alone are involved, the course of decision in this country has been not to follow the English precedents. And declarations of deceased persons have been received to establish boundaries of private tracts of land in cases where they would undoubtedly have been rejected in England. The rule prescribing the conditions of admissibility is not uniformly stated in the different states. And, although the weight of authority appears to be in accord with the principal case, some of the courts have set precise limitations to the reception of hearsay evidence in matters of peculiarly individual concern.

In Massachusetts, in one instance, it is said: "The exceptions to the general rule, excluding hearsay evidence, which permit the introduction of reputation or tradition, or of declarations of persons deceased, as to matters of public or general interest, or questions of pedigree, do not extend to a question of private boundary in which no considerable number of persons have a legal interest." *Hall v. Mayo*, 97 Mass. 416, 418; citing 1 Greenl. Ev. secs. 103, 104, 145, and note; *Green v. Chelsea*, 24 Pick. 80; *Dunraven v. Llewellyn*, 15 Ad. & El. (N. S.) 791; *The Queen v. Bedfordshire*, 4 El. & Bl. 535. In the later decision of *Long v. Colton*, 116 Mass. 414, one corner of the premises in question was described as on the land of a third person. A witness was offered to testify to conversations had with this third on his land, about the corner, but the court would not receive evidence of the statements of such person, who had since died. Judge Colt first cites *Bartlett v. Emerson*, 7 Gray, 174, wherein it was held, that "to be admissible, such declarations must have been made by persons now deceased, while in possession of land owned by them, and in the act of pointing out their boundaries, with respect to such boundaries, and when nothing appears to show an interest to deceive or misrepresent. * * *

* * * * * The declarations offered and rejected at the trial do not come within the exception thus defined to the rule, by which hearsay is excluded. The decisive objection to their competency is, that they do not appear to have been made while in the act of pointing out the boundaries of the declarant's land. This is an element which can not be disregarded, especially when the question is one of private boundary. The declaration derives its force as evidence from the fact that it accompanies the act which it qualifies or gives character to. The declaration is, then, a part of the act. Without such accompanying act, the declaration is mere narrative, liable to be misunderstood or misapplied, and open to the objections which prevail against hearsay evidence. The declaration rejected does not appear to have been offered for the purpose of establishing a boundary by traditionary evidence or reputation. Such evidence has sometimes been said by American courts to be admissible, and in the cases from New Hampshire, cited by the defendant, it seems to be

held that declarations of deceased persons, who, from their situation appear to have the means of knowledge, and who have no interest to misrepresent the facts, are admissible to establish private boundaries, although not made on the land: *Smith v. Forrest*, 49 N. H. 230, 237; *Great Falls Co. v. Worster*, 15 Id. 412, 437. But, by the current of authority, and upon the better reason, such evidence is inadmissible for the purpose of proving the boundary of a private estate, where such boundary is not identical with another of a public or quasi public nature: 1 Greenl. Ev., sec. 145; 1 Phil. Ev. (N. Y. ed. 1849) 241, 242, Cowen & Hill's notes; *Hall v. Mayo*, 97 Mass. 415."

Notwithstanding what is said in this decision, we apprehend that the preponderance of authority sustains the position of the New Hampshire cases, as above outlined, and that the recent expressions of judicial opinion favor the view that "the declarations of deceased persons who, from their situation, appear to have had the means of knowledge respecting private boundaries, and who had no interest to misrepresent, may well be admitted in evidence." *Great Falls Co. v. Worster*, 15 N. H. 437; *Smith v. Powers*, Id. 546; *Smith v. Forrest*, 49 Id. 230; *Wood v. Willard*, 37 Vt. 377; *Child v. Kingsbury*, 46 Id. 47; *Harriman v. Brown*, 8 Leigh, 697; *Hill v. Proctor*, 10 W. Va. 84; *McCausland v. Fleming*, 63 Pa. St. 38; *Cline v. Catron*, 22 Gratt. 378; *Shook v. Pate*, 50 Ala. 91; *Kinney v. Farnsworth*, 17 Conn. 355.

The conclusions of the supreme court of Vermont, drawn from an examination of the adjudications, is thus expressed in *Wood v. Willard*, 37 Vt. 377, 390: "We think a disposition is apparent in many of the American courts to extend the exception in favor of this class of testimony to ancient boundaries between individual proprietors, and that, from a majority of the cases, the principle may fairly be deduced that the declaration of deceased persons who had actual knowledge as to the location of such boundaries, or who, from their connection with the property itself, or their situation and experience in regard to such boundaries and the surveys thereof, had peculiar means of knowledge of the same, made at a time when they had no interest to misrepresent, and made when upon or in the immediate vicinity of the boundary referred to, and pointing it out, may be received as to the location of such boundary, when, from lapse of time, there can be no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject." This qualification of the rule that the declarations be made on the premises or in the neighborhood, and while pointing out the boundary, is the same as required under the Massachusetts decision of *Bartlett v. Emerson*, 7 Gray, 174. But in *Powers v. Silsby*, 41 Vt. 288, declarations of a decedent were admitted, although not made in the act of pointing out the boundary. They were objected to because not so made. Although it appeared that they were declarations against the interest of the party making them, yet Judge Prout, speaking for the court, said: "We do not understand why its admissibility should depend upon the fact that the declaration was made upon the land and in connection with actually showing or pointing it out. The principle is the same. That he could do off and away from the premises, as well as upon or near them, and the ancient line, boundary or monument could be made equally certain, by reference or description, as to its locality and as situated with reference to then known existing lines or monuments, as by actually showing or pointing out where it was." Nor in the other decisions above cited is it pronounced an indispensable requisite to the admissibility of the declarations of a decedent that they should have been made at the time the boundaries were being pointed out.

The question of the declarant's interest arose in *Child v. Kingsbury*, 46 Vt.

47, 54, and the court, referring to its own earlier considerations of the subject, determined that the declarant need not be wholly disinterested, but that he ought not to be interested to misrepresent.

Where the declarations of a person deceased are offered to show the position of the boundaries between private proprietors, the majority of the cases cited require a personal knowledge on his part of the location of the boundary: See *Miller v. Wood*, 44 Vt. 378. There are decisions, however, which go further, it would seem. In *Kinney v. Farnsworth*, 17 Conn. 355, Judge Storrs said: "Within whatever limits the rule of evidence as to the admissibility of reputation on questions of boundary, is restricted elsewhere, it is well settled in this state that general reputation is admissible for the purpose of showing, not only public boundaries, such as those between towns, societies, parishes, and other public territorial divisions, but also the boundaries of lands of individual proprietors."

SHEPHERD v. TURNER.

[3 McCORD, 249.]

SET-OFF MUST BE AN EXISTING DEBT in favor of defendant when the action was commenced. It is not sufficient that it was contracted for before, but not transferred to defendant till after suit brought. So, a person is not entitled to a set-off against a bankrupt, unless it existed when the bankruptcy happens; nor against an administrator, unless entitled to the set-off against the decedent.

THE opinion states the case.

James J. Caldwell, for the plaintiff.

Bausket and Dunlap, contra.

NORR, J. It appeared by the report of the presiding judge that the note, allowed to be set off, in this case had not been actually transferred to the defendant at the time the action was commenced. Something like a contract appears to have taken place between the payee of the note and the defendant. And, to use the language of the judge, "the defendant had the election of taking the note of that date." If he had the election to take, he had the right to refuse. And that right must have been reciprocal. It was, therefore, at most, a mere naked contract, which could not have been enforced on either side. But even if the contract had been completed for a valuable consideration, as long as it remained executory, and the right to the note not changed by actual delivery, it was not a subject of set-off. Debts to be set off must be mutual subsisting debts at the time the action is commenced. Some of the early cases, to be sure, seem to favor a different opinion: *Reynolds v. Beerling*, Doug. 112, in note; *Sullivan v. Montague*, Id. 106. But they have been overruled by later decisions: *Evans v. Prosser*, 3 T. R. 186.

Judge Buller said he had looked into the case of *Reynolds v. Beerling* and found that it could not be supported: *Montague on Set-off*, 35; *Carpenter v. Butterfield*, 3 Johns. Cas. 145. The same doctrine prevails in cases of bankruptcy: *Dickson v. Evans*, 6 T. R. 57. To entitle a person to a set-off, his demand must be an existing one at the time the bankruptcy happens. Lord Kenyon observed in that case that "it would be most unjust indeed if one person, who happens to be indebted to another at the time of the bankruptcy of the latter were permitted, by any intrigue between himself and a third person, so to change his situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*." And Judge Ashurst observed in the same case that much fraud and great injustice would be introduced if any other rule were to prevail. We have adopted the same rule with regard to administrators. Debts, mutually subsisting at the death of the intestate only, are allowed to be set off: *Mayhew, administrator of White v. Flake*, 2 Nott & M. 398. The same principle applies to all the cases. The plaintiff may have wanted his money to pay the very debt which has now been set off against him. The defendant refused to pay until he drove the plaintiff to his action, and then he has obtained the possession of this note for the purpose of throwing the costs upon him. Such a speculation cannot meet with the support of this court. I agree with the presiding judge that the indorsement was immaterial, because, being payable to bearer, the note would have passed by delivery. But, in either case, the defendant's right could only have accrued from the time of delivery.

The motion, therefore, must be granted.

SET-OFF.—See *Gregg v. James*, 12 Am. Dec. 151, and note 152.

BENT'S EXECUTOR v. GRAVES.

[3 MoOord, 280.]

JURISDICTION.—The plaintiff can not, without consent of defendant, give him a credit so as to reduce the demand within the summary process jurisdiction or within the jurisdiction of an inferior court.

CONSENT OF PARTIES can not confer where it is denied by law.

ACTION on promissory notes. The opinion states the case.

P. Furrow, for the motion.

Irby, contra.

JOHNSON, J. The principal sum purporting to be due on the notes on which this action was brought was confessedly above the summary jurisdiction of the court: say one hundred and fourteen dollars. The plaintiff, without the knowledge or consent of the defendant, indorsed on them a credit of fifty-six dollars and forty-four cents, which he admitted to be due by him, as the executor of William Sims, to the defendant, and the question now submitted is, whether he was not at liberty so to indorse the credit and sue in the summary jurisdiction of the court for the balance, fifty-seven dollars and fifty-six cents.

That parties can not, even by mutual consent, give to the court, as such, jurisdiction in a matter which is excluded by the laws of the land, may be regarded as a settled axiom. All their powers are derived from this source. Hence the inevitable conclusion that one of the parties can not give jurisdiction by his own act. And on this principle it has been ruled in this court, that the plaintiff can not release or abandon a part of his demand and maintain an action in the summary jurisdiction for the balance: 1 Nott. & M. 192; Const. Rep. 478, Treadway's ed. In the case under consideration, there is no act of the defendant from which the court can see that he had any demand against the plaintiff, and the credit indorsed may be voluntary; and, on the other hand, we can not know but that he may demand double the amount credited; the rule therefore applies.

Motion refused.

BYNUM v. CLARK.

[3 McCord, 298.]

STATUTORY CONSTRUCTION.—The preamble to an act may be used to explain equivocal expressions, but never to control the obvious meaning of the statute, nor to supply matter not embraced in its spirit.

ACTION before a court of magistrates and freeholders, to obtain possession of a tract of land which the defendant still held, notwithstanding the determination of his lease. Verdict for the plaintiff, and an order for restitution. The defendant applied for a prohibition, which was refused, whereupon he appealed, on the ground that the refusal was an error, as the court of magistrates and freeholders have no jurisdiction of hold-over cases under parol leases.

Gregg and Brickell, for the motion.

Counsel, *contra*, not named.

JOHNSON, J. The lease under which the defendant held the premises was unwritten, and it is not pretended that the court of magistrates and freeholders are authorized by the act of 1812 (p. 39), to restore possession to the landlord in such a case. Their jurisdiction is limited by this act in terms, to cases where the tenant holds under a written lease; but, it is contended, their power is derived from the act of 1807 (p. 35). It is true that the laws before passed were deficient "in providing a prompt mode of placing landlords in possession after the legal termination of leases or agreements, parol or written, entered into between landlords and tenants;" but in the enacting clauses the only power delegated to the court, and which is found in the last clause, is confined to those cases where the tenants shall make alterations, or remove buildings erected on the premises, without the written consent of the landlord, and does not embrace the present case.

The preamble to an act may be used to explain an equivocal expression used in the enacting clause, but never to control its obvious meaning, nor to supply matter not embraced in its spirit and meaning; but in any view of this act, there can be no doubt as to this case. The preamble and enacting clause are in perfect unison. The former points out the evil, and the latter provides a remedy for a particular case. The case of *McDonald and Bonner v. Elfe*, 1 Nott & M. 501, is directly in point, and although the construction of the act of 1817 was not necessary to that case, it appears to have been well considered, and the reasoning is very satisfactory.

Motion granted.

STONEV. v. THE UNION INSURANCE CO.

[3 McComb, 387.]

INSURANCE.—If the assured undertake to state all the circumstances which can affect the risk, he must do so fully and fairly. He will not be permitted to excuse himself by saying that he failed to communicate a fact, because it was already known to the insurer.

ACTION on a policy of insurance. The contract appears from Judge Nott's opinion. A verdict was rendered for the plaintiff. The defendant then moved to enter up a nonsuit or for a new trial on the following grounds: 1. Because the voyage insured, being by the policy an original voyage, "at and from Charleston," and the voyage sailed on being one from Havana to Marseilles, touching at Charleston, the risk insured never attached;

2. Because, if the policy could be extended to the voyage sailed on, there was a concealment of the material fact that the vessel was loaded at Havana, a belligerent port; and the offer being silent on the subject, though professing to disclose all material things, proved a misrepresentation on the part of the insured; 3. Because the presiding judge charged the jury that they had the privilege of judging, from the newspapers and other evidence, whether the company had knowledge of the fact of the voyage having commenced at Havana, and of the cargo being laden there; and that if they knew it, no disclosure to them was necessary; whereas, it is contended, that it has been settled that the insurer is not to be affected by presumptive knowledge of any private thing not contained in the offer, which offer can not be altered by parol or by presumptive testimony; 4. Because the presiding judge told the jury they might judge of the fact and find, if they pleased, that the concealment was immaterial.

Prioleau and Toomer, for the motion.

Hunt and Memminger, contra.

COLCOCK, J. This is the second time this case has been before us: Harper's L. R. 235. I shall express no opinion on any of the grounds but the third, on which a new trial must be granted. On this ground a new trial was formerly granted, and there has been no new evidence given to vary the case. Where the assured undertake to state all the circumstances which can affect the risk, they must do so fully and faithfully. The rule admits of no exceptions. It can not be an excuse to say, when a loss has taken place, that the insurers knew such a fact, and therefore it was not communicated. It is asked, why tell a man what he already knows? The answer is very plain and forcible, because you have expressly undertaken to do so; and from the nature of the contract, and the relative situation of the parties, it is necessary that you should do so. The case illustrates the usefulness and propriety of the rule.

It is said the underwriters knew that this vessel had come from Havana, and had been loaded there. Now, let it be conceded for a moment that they did know it, they also knew that her cargo might have been discharged here and re-shipped, and that then this would have been the port of departure, and the sailing from hence the commencement of the voyage, and have brought the case within the language and meaning of the offer. Here it is urged that if it be admitted that the underwriters

knew the fact of the arrival of the vessel from Havana, and her having been loaded there, that then they should have inquired as to the other facts. But it must be perceived that this is at once destroying the effect of the rule, and imposing on the underwriters a duty which the insured, by the contract, had undertaken to perform. The law on this point is well established, and after what has been said in the former opinion delivered in this case, it is not deemed necessary to add any further observations. The verdict is a violation of the law in this most important provision, and strikes at the very foundation of the contract of insurance. It has been suggested that the jury may have thought the fact not material, but it can not be believed that any twelve impartial men, possessed of ordinary understanding, can think it was unimportant that this vessel had shipped her cargo at a Spanish port, when it was incontrovertibly proved that the Spanish patriot vessels were cruising in the Mediterranean, and actually capturing Spanish vessels and goods at that time. And in addition to this there was an expression of an opinion by every witness conversant with mercantile affairs, that it was an important fact, and did increase the risk.

The motion is therefore granted.

Norr, J., dissenting. This was an action on a policy of insurance on the ship John "at and from Charleston to Marseilles, and from thence to Havana, for this present voyage beginning the adventure upon the said vessel as aforesaid, and so shall continue and endure during the voyage aforesaid, etc., safe at Charleston, intended to sail in about three days, etc., dated, Charleston, August, 1818." A policy was effected the same day between the same parties on goods (sugar and logwood), "at and from Charleston to Marseilles, beginning the adventure upon the said lawful goods and merchandise from and immediately following the boarding thereof on board the said vessel at Charleston aforesaid," etc. The vessel arrived safe at Marseilles, but was lost on her return voyage to Havana. It appeared in evidence that the vessel had actually cleared, but at Havana for Marseilles previous to the insurance, and had merely touched at Charleston for orders, but had not entered nor cleared out from that port. The jury found a verdict for the plaintiff and this was a motion for a new trial, or for a nonsuit on the following grounds. [Here his honor repeated the grounds heretofore stated].

A policy of insurance like every other instrument of writing

must be construed according to the natural and obvious meaning and import of the words. The words of this policy imply that the vessel was at the time of insurance at Charleston. It cannot be inferred from the face of the policy, that the voyage was to commence, or that the cargo was to be taken in there, but merely that the adventure was to commence at that place. The vessel was there at the time, and the warranty therefore was true. In *Kemble v. Bowne*, 1 Cai. 80, it is said if a ship be at the place in safety at the time the policy was subscribed, it cannot be material where she was prior to that day. That is precisely the case here. The vessel was at Charleston in safety at the time the adventure or risk commenced, and therefore it could not be material where she was before. In the case of *Hull v. Cooper*, 14 East, 479, it was held that a policy at and from a particular place did not even imply that she was there at the time, but that she would shortly be there, and that her not being there was not such a deception as would vacate the policy unless the risk was thereby increased, which was a question of fact for the jury. The case of *Spitta v. Woodman*, 2 Taun. 416, appears to be very obscurely reported. The ground of decision is not distinctly stated in the opinion of the court. But enough can be collected from it to satisfy us that the decision can have no influence on this case. The action appears to have been on two policies on the ship *Daniel and Frederick* "at and from Gottenburgh," on specific goods, etc., beginning the adventure on the said goods from the loading thereof on board the said ship (not saying where). The goods had been put on board at London before the first of April, 1808. The declaration averred that on the eighth of May following, the ship in the policy mentioned with the goods on board thereof, as aforesaid, was in good safety at Gottenburgh. The exception taken was that the words "at and from Gottenburgh, beginning the adventure on the said ship," must mean on board the said ship at Gottenburgh, as no other place was mentioned. If that were the true construction of the policy, then it never could have attached, because the event never occurred, as no goods were laden at Gottenburgh. If that were not the true construction of the policy, and it was the intention to aver that the goods were laden at Gottenburgh, then the proof did not support the declaration. It does not appear from the decision upon which ground the judgment of the court was founded, but it is apparent that the motion must have succeeded upon one or the other. No such objection arises in this case, because the vessel was at Charleston as the policy states, and the declaration avers.

The case of *Robertson & Thomason v. French*, 4 East, 130, turned upon the words of the policy. In that case the insurance was upon both the vessel and goods "beginning the adventure upon the said goods from the loading thereof on board the said ship, etc., on the coast of Brazil," and upon the ship, etc., in the same manner. It appeared in evidence that the goods had been shipped at the cape of Good Hope, and not on the coast of Brazil. The plaintiff obtained a verdict and a rule was obtained for setting aside the verdict, and entering a nonsuit on two objections. The second is the only one which is necessary to notice; which was, that the policy never attached, the adventure on the cargo being by the terms of the policy made to commence "from the loading of the goods on board the ship on the coast of Brazil," an event which never happened, inasmuch as the goods were not loaded there, but at the cape of Good Hope; and that as the adventure on the ship was by the terms of the policy made to commence "in the same manner" with that on the goods, it could, of course, have no commencement if that on the goods never attached. The objection was sustained on the ground "that the adventure could only attach on goods and ship after loading of goods had taken place on the coast of Brazil." The case of *Langhorn v. Hardy*, 4 Taun. 628, depended upon the same principle. The case now under consideration is upon a separate policy on the ship alone, not at all depending upon the terms of the policy on the goods. If this policy had contained the words "from and immediately after the loading of the said goods on board the said vessel at Charleston," it would have come within the cases of *Robertson & Thomason v. French*, and *Langhorn v. Hardy*; but containing no such provision, it must be construed without any reference to the policy on the goods. The case of *Horney v. Lushington*, 15 East, 46, is a stronger case than this. In that case a single policy was effected on both goods and ship, not a separate policy on each, at and from Gottenburgh to Riga, beginning the adventure on the goods from the loading thereof on board the said ship at Gottenburgh. It appeared that the goods were laden on board the ship in the port of London. It was held that the policy on the goods never attached and a proportional return of the premium was allowed. The principle settled in all the cases is this: That, where the adventure is to commence after the loading of the goods at any particular place, and it shall appear that they had been previously laden at some other port, the policy cannot attach, because the event has not occurred. And if the policy on the

vessel depends upon the same event, it will receive the same construction. But when it has relation to the goods alone, it can not affect the policy on the ship: See *Richards v. The Marine Ins. Co.*, 3 Johns. 307; *Graves & Scriba v. The Marine Ins. Co.*, 2 Cai. 339. Goods may be damaged between the port where they are laden and the port at and from which the risk is to commence; any other construction, therefore, would subject the underwriters to loss not covered by the policy. And if that is the construction where ship and goods are both embraced in the same policy, how much more strongly will the rule apply where there are separate policies on the ship and goods; and the particular clause which gives construction to the contract upon the goods, is omitted in that upon the ship. I do not find any case where the words at and from have been held to imply the commencement of the voyage. I am of opinion, therefore, that there was no breach of warranty in this case.

With regard to the second point, it was my opinion that the fact of the voyage having commenced at Havana, and the ship was now about to sail with the original cargo on board, were material facts which might have increased the risk, and ought, therefore, to have been disclosed at the time the offer was made; and it was upon that ground that I thought a new trial ought to be granted on a former motion; but it all depended upon the fact, whether the risk was thereby increased; and that was a question for the consideration of the jury: *Hull v. Cooper*, 14 East, 479. And although I still think the testimony very strong on that point; yet as there have been two concurrent verdicts in favor of the plaintiff, I do not think that we ought again to interfere. But whether material or not, if all the facts were known to the underwriters, it would not affect the policy. And whether their knowledge was derived from the insured or from any other person, was not material. It is not necessary to disclose what the insurers may have learned from any other source: *Phil. Ins.* 104; 1 Cai. 489. And whether they were acquainted with the facts or not was a question for the jury. There was no error therefore in the charge of the judge on that point.

On the last point, I have already expressed my opinion. It was a question of fact for the jury, and was very properly left to their consideration. I would also further observe that this court can never form as correct an opinion of evidence as the judge who receives it immediately from the lips of the witnesses. And the presiding judge expresses himself perfectly satisfied with the verdict in this case.

GALPIN v. HARD.

[3 McCord, 394.]

DEMAND ON DRAWER OF A NOTE must usually be made to charge the indorser. This rule is subject to numerous qualifications and exceptions, where no such demand can be made without unreasonable labor and inconvenience, as where the drawer has removed into a distant country, or can not be found.

THE REMOVAL OF THE MAKER OF A NOTE from the place where he resided, or was in the note represented to reside, imposes upon the holder the duty of using every reasonable endeavor to find the maker, and demand payment of him, in order to charge the indorser.

NOTE PAYABLE TO BEARER must be presented, and demand for payment made, in the same manner as if payable to order.

NOTE DATED AT A PARTICULAR PLACE is not payable there only; if the maker be not found there, he must be sought elsewhere, and demand made of him if found.

ACTION against the indorser by the indorsee of a promissory note, drawn by Fishburn at Charleston, in April, 1821, in favor of B. F. Hard, or bearer. On the last day of grace, the notary who protested the note, called on the defendant for payment, stating that he could not find the maker in the city. The defendant then said that the maker lived in the country, and the notary gave the defendant a notice to be sent to him. Evidence was introduced to prove the place of Fishburn's residence. Some of the testimony established that he was in Charleston on the day the note was dated, and that he resided at St. Bartholomew's parish; other evidence was to the effect that he lived in the country, and visited Charleston from time to time. A motion for a nonsuit, on the ground of no demand being made, was overruled, and a verdict found for the plaintiff.

Cruger and Petigru, on behalf of the defendant, appealed on the grounds: 1. That no demand was proved on the drawer, or at his residence; 2. That the court charged the jury that no demand on the drawer is necessary where the note is payable to bearer, for the purpose of subjecting the indorser to liability.

Clarke, contra.

JOHNSON, J. The first ground of this motion embraces a proposition which, as a general rule, can not be controverted; that the indorsee of a promissory note must demand payment of the drawer before he can charge the indorser. This rule, it is true, admits of numerous qualifications, or rather supersedes the necessity of a personal demand in a variety of instances which

would impose on the holder an unreasonable degree of labor and inconvenience, and it has been contended in opposition to this motion that, where the drawer has left the place at which he resided at the time the note was drawn, the case falls within this class of exceptions, and that the holder is not bound to inquire further after him. And, in support of this position, the cases of *Stewart v. Executors of Eden*, 2 Cai. 121 [2 Am. Dec. 222], and *Ogden et al. v. Cowley*, 2 Johns. 275, have been relied on.

In the first of these cases, the drawer had a house on Long Island and a store in New York, at the latter of which the presentment was made, and payment was demanded of his clerks, who answered that he had gone into the country and had left no instructions. In the latter case, the notary called at the house of the drawer in the city of New York, which he found shut up, and was informed that he, also, had gone into the country. It is impossible to reconcile these cases to the general doctrine on the subject without supposing that they proceeded on the ground that the drawers had not changed their residence, or that the holders were unable to discover to what places they had removed, either of which would have dispensed with a personal demand, and, with this qualification, they do not sustain the position contended for. In point of fact, however, it does not appear to me that they are analogous to the case under consideration. Judging from the evidence, the strong probability is that Mr. Fishburn had no permanent residence in town. His residence here was the temporary residence of a student at law, and that only for the winter. He had no house, and his lodgings were probably changed as often as caprice or convenience required, and it does not appear that inquiry was made either at his boarding-house or at the office where he studied. His permanent residence, if, indeed, he had any, was in St. Bartholomew's parish, and all these circumstances are presumed to have been known to the plaintiff. If they were not, an inquiry of any one who knew anything about him would have led to it, so that, according to the view taken of the cases relied on, it does not fall within them.

But I take it that it is a well settled rule that, when the drawer of a bill of exchange or the maker of a promissory note has removed from the place where the bill or note represents him to reside, and, for the same reason, where he did reside at the time the bill was drawn or the note made, the holder is bound to use every reasonable endeavor to find out whither he has removed, and if he succeed, present it for payment: Chit.

on Bills, 334, 335, Riley's ed. 1821, and the cases there cited. And if we examine into the nature of the contract between the indorsee and indorser, we must admire its reasonableness and good sense, however arbitrary the rule itself may be in terms. The indorsement is literally and substantially an order on the maker of a note to pay the amount to the indorsee. Its object, therefore, can not be attained without its presentment, and hence the obligation which it imposes on the indorsee, and if he intends to discharge it, the inquiry would suggest itself, where does he reside, or where is he to be found? He knows, too, that our places of residence are changed as often as interest or fancy prompts, and he takes it, subject to that inconvenience, as a part of the contract; therefore the rule imposes no hardship, especially when qualified by the exceptions which dispense with a demand where the maker has absconded or removed into a distant country.

On the second ground also, the defendant is clearly entitled to a new trial. It is not necessary, I am aware, to indorse a note payable to bearer in order to transfer it; that may be done by delivery. For the plaintiff, it is contended that such an indorsement is in effect a bill of exchange, drawn by the indorser on himself, and that, therefore, it is not incumbent on the indorsee to look elsewhere for the payment, and Buller's N. P. 273, 7 ed., by Bridgman, is relied on as an authority in point. The case of *Wilmore v. Young*, said to have been decided by Eyre, at Guildhall, M. 1 Geo. II, is referred to in support of the text, where it is said, that to charge the indorser of a note payable to bearer, it is not necessary to make a demand on the drawer, because "the indorser is in nature of an original drawer." However, we may venerate the opinion of that learned judge as a *nisi prius* case, it cannot be regarded as conclusive authority and if we adopt the reason on which it is founded, it proves too much, and is destructive of the whole fabric which has been founded on the theory of indorsements. Every indorsement is equivalent in its effects to drawing a new bill, and the indorser, in almost every respect, is considered as a new drawer: Chitty on Bills, 183; and if that reasoning prevail, there would be no necessity in any case to make a demand on the drawer of a bill, or the maker of a note.

Whatever similitude the indorsement of a note payable to bearer may have to a bill of exchange, and however nearly the indorser may be assimilated to an original drawer, it is evident from the nature of things that something more was intended,

and must be implied, than belongs to these relations. If he intended only to charge himself, why, let it be asked, did he not do so by making his promissory note, or drawing a bill on himself in the usual way? Why put beyond the reach of his control, a fund which might possibly enable him to meet it, by indorsing and delivering the note? A conclusion so much at war with common sense will never be imputed to such astute and intelligent men as compose the mercantile community. The indorsement of such a paper must, therefore, mean something more than a mere charge upon the indorser, and I am unable to see any reason why it should be distinguished from the ordinary case of indorsing a note payable to order. So far as it goes to charge the indorser, the effect is the same, and although it may not be indispensably necessary to enable the indorsee to make a demand on the drawer, yet it is calculated to remove any suspicions that might arise as to the manner in which he obtained the possession. There cannot, therefore, exist any good reason why it should not impose the same obligation on the indorsee to make the demand on the drawer of the note, and, with the exception of the case noticed, the books contain no such distinction. On this ground, therefore, the motion is granted.

An argument in opposition to the motion has been drawn from the circumstance that the note was dated at Charleston, and hence it is concluded that it is made payable there, and as such the plaintiff was not bound to present it for payment elsewhere; but this question was concluded by the case of *Miller & Co. v. Thompson*, decided during this term. The place at which it is to be paid is not necessarily indicated by the place at which it is dated.

PLACE OF PRESENTMENT.—When a note is not made payable at any particular place, but is dated at some town, the presumption is that the maker's residence is in that town. And although there is some uncertainty in the books in regard to what is sufficient presentment for payment in such case in order to charge an indorser, the weight of authority appears to authorize the statement: If the holder do not know that the residence and place of business of the maker are elsewhere, he may rely on the presumption that the maker resides where the note is dated, and if he have the note at that place on the day of maturity, and make inquiry there for the maker, the indorser will be liable. This view is approved by Daniel, 1 Neg. Inst., sec. 640, and Story, Prom. Notes, 281; but not adopted by Parsons, 1 N. & B. 458. On page 453, the latter author says: "We have already alluded to the circumstance of the note being dated at a particular place, and the presumption to be drawn therefrom. We should add, that neither this fact nor any other excuses the want of due diligence; it only raises the question, what is in that case due diligence? And we incline to think the answer

should be that this date does not excuse a holder from demanding payment of the note elsewhere, if within the state, and the holder knows, or ought to know where he is; but that a holder is not bound to make more inquiry than within that town, unless there be something which tells him that by going elsewhere within the state he will find him." Although this proposition is somewhat contradictory, the position which the author takes might be supported by requiring a person before he receives a negotiable instrument to satisfy himself as to the place of business or residence of the maker. To postpone inquiries until the day of payment, would in many instances render a due presentment impossible. It is probably this feature of inconvenience, an element especially undesirable in commercial paper, that has influenced the courts in holding sufficient a presentment at the place of date, where the actual whereabouts of the maker are not known. Decisions bearing upon this question are: *Meyer v. Hilscher*, 47 N. Y. 270; *Smith v. Philbrick*, 10 Gray, 252; *Staylor v. Williams*, 24 Md. 199; *Taylor v. Snyder*, 3 Denio, 145; *Mason v. Pritchard*, 9 Heisk. 793; see, also, the note to *Hepburn v. Toledano*, 13 Am. Dec. 345.

That the holder is ignorant of the maker's place of residence is very important in determining the sufficient mode of presentment above stated. For some of the cases go so far as to say that if the residence were known, although it might be without the state, presentment must be made there in order to charge the indorser. Such is the opinion expressed in *Taylor v. Snyder*, 3 Denio, 145. And in *Bank of Orleans v. Whittemore*, 12 Gray, 469, 473, an action on a note dated at Boston and payable generally, the maker residing in North Carolina. The place of residence was known to the holder's agent. The court held the agent's knowledge was the knowledge of the holder, and presentment and protest not being regularly made at the place of residence of the maker, that the indorser was discharged. In the course of his opinion Judge Metcalf said: "We hold, that where the maker of a note, when it was made and indorsed, has a known residence out of the state, which residence remains unchanged at the maturity of the note, demand must be made on him, or due diligence used for that purpose, and notice of non-payment given to the indorser before the indorser can be charged." If the maker is within the state, and the holder knows where he may be found, presentment must be made there: 3 Kent. Com. 97.

Questions may arise where the knowledge of the maker's residence was not received until too late to forward the instrument for presentment at maturity. This objection was adverted to as perhaps a reason for the rule above laid down, and was considered by Story on Prom. Notes, sec. 265, and in *Mason v. Pritchard*, 9 Heisk. 793. At these last citations, the fact of the lateness in acquiring knowledge, it is said, will not be considered when it would prejudice indorsers who have transferred the instrument long enough before maturity to have a due presentment made. But that as between the immediate parties to a transfer near maturity, a reasonable time thereafter ought to be given in which to present the note and make demand.

WITH REGARD TO THE CHANGE OF RESIDENCE of the maker of a note payable generally after the execution of the note, what has been said applies with full force where he does not move without the state. If the maker leave the state, it is not necessary for the holder to follow him in order to make presentment: *Hepburn v. Toledano*, 13 Am. Dec. 345.

MEADOWS v. MEADOWS.

[3 McCord, 458.]

AUCTION SALES are within the statute of frauds.

AN AUCTIONEER IS THE AGENT of both parties and may make the memorandum required by the statute of frauds.

AN AUCTIONEER'S CLERK is not authorized to make the memorandum to take the case out of the statute of frauds.

MEMORANDUM OF SALE to take the case out of the statute of frauds must show distinctly the article sold, the price thereof, and the name of the purchaser. "The tract of land to Wm. Meadows, jun., at five dollars and forty-eight cents," is an insufficient memorandum.

ASSUMPT for the purchase-money of a tract of land bid off by the defendant at an auction sale. The questions raised were, whether the auctioneer's clerk was a sufficient agent of the parties to bind the defendant by an entry of the sale in the auctioneer's book; and whether the entry, which was as follows: "The tract of land to William Meadows, jun., at five dollars and forty-eight cents," was sufficient.

May, for the defendant.

Levy and McWillie, contra.

COLCOCK, J. Upon reading the statute of North Carolina it is found to be in the very words of the statute of frauds, with the addition of the words slave or slaves, and consequently subject to the same construction which that statute has received. It was soon discovered that the provisions of the statute of frauds greatly impeded the business of sales at auction, and the first effort was to declare that they were not embraced within its provisions. But the generality of its terms was too extensive to be thus restricted, and it was then decided, in the case of *Simon v. Motivos*, 3 Burr. 1921, that the auctioneer was the agent of both parties, and that his putting down the name of the purchaser, the article sold, and price and terms, should be considered as a sufficient compliance with the requisites of the statute. The articles sold were goods.

For some time it was held that this doctrine was not applicable to the sale of lands or any interest in them, and several decisions to that effect were made. The first was that of *Stansfield v. Johnson*, 1 Esp. 101. That was a sale of copyhold lands, and the chief justice held the defense of the statute of frauds good, saying that the case of *Simon v. Motivos*, applied only to goods. This was followed by the case of *Walker v. Constable*,

1 Bos. & P. 106, in which the same opinion was expressed; and in the case of *Buckmaster v. Harrop*, 7 Ves. 341, was decided by Sir William Grant, on the authority of these two cases. But Lord Erskine and Lord Eldon afterwards both gave contrary opinions. They ask, why the difference? Although the form of the two clauses differ not as to that part of them which requires the memorandum in writing, they are the same: 13 Ves. 456; 9 Id. 249. And these decisions have been followed by several others which may be considered as putting the question at rest: *Emmerson v. Heelis*, 2 Taun. 38; and *White v. Proctor*, 4 Id. 209; and *McComb v. Wright*, 4 Johns. Ch. 665. But, although I am compelled to yield to this weight of authority, I cannot forbear to express an opinion that it would have been better to have adhered to the provisions of the statute. For although, from the concourse of persons who usually attend these public sales, it may not be easy to practice fraud, yet there is no doubt but it is sometimes done; at all events, much litigation would have been prevented.

In the case before us, however, the plaintiff can not succeed, for the entry was not made by the auctioneer, and we must be careful not to extend the doctrine so far as entirely to destroy the salutary provisions of the statute. The entry appears to have been made by the clerk, and, in the first case above referred to, *Coles v. Trecothick*, 9 Ves. 251, it was held that an auctioneer's clerk, notwithstanding any usage of trade to the contrary, is not an agent, within the statute, whose signature will give validity to a contract of sale by auction unless the authority of the party has been specially obtained for that purpose, or he has assented to it. Again, in all the cases, and in the leading case in particular, it will be found that it is required that the entry, to be a compliance with the provisions of the statute, must be a memorandum of the contract; that it must distinctly state the articles sold, the price, and the purchaser's name: *Hodgkins v. Bond*, Adams, 284; *Parkhurst v. Van Cortland*, 1 Johns. Ch. 273. Now, the entry produced is in these words: "The tract of land to Wm. Meadows, jun., at five dollars and forty-eight cents." What evidence does this afford of the contract? What tract of land? How many acres? Would such a description convey any title to the purchaser? Would it enable him to compel a performance of the contract by the vendor, should he refuse? It certainly could not. Therefore it can not operate against the defendant. On these two grounds the determination of the court rests. But if it had been neces-

sary to investigate the other grounds, there is no doubt that more than one of them would have been sustained.

The motion is granted.

MEMORANDUM OF SALE AT AUCTION.—See note to *Davis v. Rowell*, 13 Am. Dec. 398.

TIME WHEN MEMORANDUM MUST BE SIGNED.—*Id.*

WHO MAY SIGN MEMORANDUM.—The principal case is not in harmony with the weight of authority in regard to the power of the auctioneer's clerk to sign the memorandum. See note to *Davis v. Rowell*, *supra*.

HOUSTON v. HOUSTON.

[3 McCORD, 491.]

WILL OF PERSONALTY must be executed and attested as required by the law in force at the death of the testator.

APPEAL from the decision of the ordinary denying probate to a paper offered as the will of A. Houston, deceased. The paper was dated December 14, 1824, and was not witnessed. The testatrix died in September, 1825. The ordinary rejected the paper because it was not witnessed, as required by the act of 1824, although it was signed prior to the passage of the act. The motion to set aside this decision was based on the reason that the will was a good will to pass personalty, and therefore ought to have been admitted.

Saxon, for the motion.

McCraven, *contra*.

NOTT, J. This case has been submitted to the court without argument or authority; but the court is satisfied with the decision of the court below. A distinction has always been made between a will, by which land is devised, and a testament containing bequests only of personal property. A devise of real estate is considered in the nature of a conveyance, and, therefore, can only operate upon lands of which the testator is seised at the time of executing the will: Rob. on Wills, 295, 296, 297; Richardson, do., 57. It would seem, therefore, that in the construction of such an instrument, relation must be had to the time of its execution. And yet, even in that case, I am not prepared to say that so far as regards its execution, it must be done according to the existing law, at the time of the testator's death; but, with regard to bequests of personal property, *mens ambulatoria est usque ad mortem*. The will takes effect from the

time of the death of the testator, without regard to the time of its execution. Goods and chattels, therefore, which he has at the time of his death, will pass under it, although he did not possess them at the time of making the will, because they go to the executor, and pass not by the will, but by his assent, to whom the will is only directory: *Richardson*, 57; *Bauter v. Coke*, 1 Salk. 237. If, therefore, a will is not considered as having existence until the death of the testator, it must be executed according to the law at the time, and this will, not having been executed according to the provisions of the act, which was passed previous to the death of the testator, is void and of no effect.

The motion must, therefore, be refused.

DE GRAFFENREID v. MITCHELL.

[3 McCORD, 506.]

PRESUMPTION OF GIFT arises from a parent's suffering property to go into possession of a child upon its marriage.

BREAKING OPEN DOORS of a dwelling-house to levy an execution upon the owner, or one of his family, or upon his or their goods, is a trespass; but demand being first made and refused for the opening of the doors, the house may be broken into to levy a writ, or to retake goods belonging to another than the owner of the house, or the members of his family.

TRESPASS vi et armis, to recover the value of four negroes, and for breaking and entering the plaintiff's house. It appeared that Mitchell, as sheriff, had levied upon the negroes, as the property of James V. Thomas. The plaintiff laid claim to the negroes, and, by some means, got them into his possession. The defendant thereupon called at plaintiff's house, in which the negroes were, demanded admission, and, on being refused, kicked in the door, entered, and took the negroes. The defendant contended that the plaintiff had given the negroes to his daughter, the wife of Thomas. The jury were strongly charged in favor of the defendant, but found a verdict for the plaintiff. The defendant then moved for a new trial.

Herndon, for the motion.

Williams, *contra*.

NOTE, J. Several questions have arisen in the progress of this cause, which it is not now necessary to notice. The only two questions on which the court consider it necessary to express an opinion are: 1. Whether the plaintiff established a

right of property in himself? 2. If he did not, whether the defendant had a right to break the door for the purpose of getting possession of the negroes?

It appeared in evidence that the plaintiff had given, or lent, as he pretended, these negroes to his daughter at the time of her marriage with James V. Thomas. They had been in the possession of Thomas, and claimed and used by him as his own for two years. In the mean time he had become very much involved. Judgments were obtained and executions issued against him, by virtue of which the defendant, as sheriff of Union district, had taken them into his possession. The plaintiff had decoyed them away, and this action was brought for a trespass in retaking them in the manner set forth in the report. It now became a question whether the plaintiff had loaned or given the negroes to his daughter. Questions of this sort have so often occurred in our courts, and the law is now so well settled on the subject, that it would be a cruelty to the public to suffer a doubt to be raised whether such a transfer of property did not amount to an absolute gift. The former suit, also between these parties, appears to have been conclusive of that question; for it is admitted that the defendant then recovered the value of these negroes. The record, therefore, in that case ought to have been received as evidence in this. Indeed, the verdict in this case repels the idea of the right of the property in the plaintiff. For if the property had been his, he ought to have recovered its value. The whole case, therefore, resolves itself into the question, whether, under all the circumstances, the defendant was authorized to break open the door to retake the property.

It is said, in *Lemayne's case*, 5 Co., that the sheriff, at the suit of a common person, upon request made to open the doors and denial thereof, ought not to break open the door of the house to execute any process at the suit of any subject, or to execute a *fieri facias*, but if he do, he is a trespasser. Yet it was resolved that the house of a man is not a castle or defense for any other person but for the owner, his family and goods, and not to protect another who flyeth into the same, or the goods of another; for then the sheriff, upon request and denial, may break the house, and do execution. A distinction is attempted to be made between the case before us and the one in Coke. That the sheriff was not about to execute the process, but to retake the goods after they had been in execution, and had in contemplation of law become his own. But the princi-

ple is the same, except that this is a stronger case, the goods being in the custody of the law. The house of every man, says Lord Coke, is to him as his castle and fortress, as well for his defense against injuries and violence, as for his repose. And the reason is, *domus sua cuique est tutissimum refugium*. But the principle is not to be extended beyond the object which the law intended to effect. The house or castle of a man is to be a refuge for himself, a place of safety for his goods, and of repose for his family. But that immunity is to be allowed only to the owner himself. It is not to be a sanctuary for others. It does not appear that the sheriff was guilty of any rudeness to the family, or that he used any unnecessary force or violence. I concur, therefore, in the opinion with the presiding judge, that he was guilty of no trespass and that the verdict ought to have been for the defendant.

A new trial is therefore granted.

WHEN SHERIFF A TRESPASSER.—*Hazard v. Israel*, 2 Am. Dec. 438, and note; *Barrett v. White*, 14 Id. 352, and note 365.

SHERIFF'S LIABILITY FOR DEPUTY'S TORTS.—*Campbell v. Phelps*, 11 Am. Dec. 138, and note. 145.

LEE v. PERRY.

[3 McCORD, 582.]

STATUTE OF LIMITATIONS—ACKNOWLEDGMENT.—When the note was presented to defendant he said: "That note has not been paid, and I will not pay it unless compelled by law, as it is out of date, and I received no consideration for it;" and this was held to be a sufficient acknowledgment to take the case out of the statute of limitations.

ASSUMPSIT on a promissory note. Pleas, the general issue and statute of limitations. To avoid the latter plea, evidence was offered that the defendant had said after suit was commenced, "that the note had not been paid, and that he would not pay it unless compelled by law, as it was out of date, and he had received no consideration for it." The jury under the instruction of the presiding judge found for the plaintiff. Defendant appealed.

Bullard and Holmes, for the defendant.

Carter, contra.

COLCLOCK, J. It seems to be impossible to lay down any rule on this subject which will be intelligible. In *Burden v. Mc-*

Elhenny, 2 N. & M. 60 [10 Am. Dec. 570], the opinion commences in these words: "I think it is high time this question was at rest. I lay it down that a bare acknowledgment of a subsisting debt is sufficient to take the case out of the statute of limitations;" and I think the decisions of the court have been uniformly in support of this position. In the case referred to the authorities are examined and commented on. And in the case of *Boyd v. Carmichael*, it is said, "a clear and explicit acknowledgment of the debt will take it from the operation of the statute:" 2 N. & M. 62.

Now what is the report of the present judge in this case. "A witness presented the note to the defendant, who said that the note had not been paid, and that he would not pay it unless compelled by law, as it was out of date, and he had received no consideration for it." Now it is impossible, by any other words, to convey more distinctly that this was a subsisting debt. This, to be sure, is not a promise to pay, but that is unnecessary, it is so distinctly stated in all the late cases. If the existence of the debt be acknowledged, there is a legal promise to pay, and the debt is not barred by the statute.

ACKNOWLEDGMENT AVOIDING THE BAR OF THE STATUTE OF LIMITATIONS.—
See *Fries v. Boisselet*, 11 Am. Dec. 683, and note containing references to other examinations of this question in this series.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

CROCKER v. SPENCER.

[S. D. CHIPMAN, ES.]

EXEMPTION FROM EXECUTION of articles "necessary for upholding life," entitles the judgment-debtor to his cooking stove; it is not an article of ornament or luxury.

ERROR to the Rutland county court to reverse a judgment obtained against the plaintiff in error, who was also the plaintiff below in an action of trespass brought against the defendant for the taking of a certain cooking stove. The defendant pleaded that he took the said stove, as a deputy sheriff, by virtue of a writ of execution against the plaintiff. The plaintiff replied that at the time of the taking of the said stove the same was, and ever has been, in actual use in the plaintiff's dwelling house as his property, and was a "necessary article of household furniture for the upholding of life." The defendant rejoined that at the time there was a chimney, fire-place, and oven, in the plaintiff's dwelling-house, and all necessary cooking utensils. General demurrer to the rejoinder, which was overruled, and judgment given for the defendant.

Strong, for the plaintiff in error.

Page, for the defendant in error.

By Court, **AIKENS, J.** The expressions in the statute, descriptive of the property of debtors, exempted from attachment and execution, are to be understood in a qualified sense. Without such construction, no tools, arms, or articles of household furniture would be exempted, for none of these can be said to be absolutely "necessary for upholding life," as people may subsist without them.

It becomes the duty of the court, then, to define what the necessity for the article is, which the legislature contemplated should entitle a debtor to hold it against the process of his creditor. And in doing this, we think we can not better interpret the language of the legislature than by saying it is that necessity which originally induced the possessor to purchase the article for actual domestic use. A man's real estate, his stock, his horses and carriages, are the usual attendants of wealth, and tend to give him a credit abroad. It is not so with the humble implements of his kitchen. No creditor looks to these for an indemnity, when he gives a credit, and no householder purchases them, and puts them into use but from a consciousness of their necessity. Their decay in use is so rapid that there is little danger of any man's investing more property in them than his necessities seem to him to require. Besides, an invasion of the domestic board for the purpose of seizing upon articles in ordinary family use, must usually be attended with much more of vexation and distress to the debtor and his family than of utility to the creditor. It was upon considerations like these that the cases cited in argument by the plaintiff's counsel were decided. We are not disposed to overturn these decisions.

A cooking stove is an article of household furniture. It is calculated for no other use. It is not an article of ornament or luxury; and if it is not necessary, it is difficult to account for its origin or its continuance in use. Though of modern invention, it is in the present state of the country as necessary as any other single article of household furniture; and when actually appropriated to the use designed, falls clearly within the reason of those cases. The stove in question was, therefore, exempt from execution, and the levy is not a justification of the trespass complained of.

Judgment that there is error, etc. And the court also consider that the defendant's rejoinder is insufficient.

GRAVES v. SHELDON.

[3 D. CHIPMAN, 71.]

REVOCATION OF DEVISES are, at common law, express or implied. The latter are termed revocations in law.

REVOCATIONS IN LAW resulted, at common law: 1. From a total alteration in the circumstances of the devisor; 2. From an actual or intended alteration in his estate; but in this state a revocation does not result from an

alteration in the circumstances of the testator, nor from an intended alteration in his estate.

IMPLIED REVOCATIONS are, in this state, those only which result *ex necessitate rei*.

REVOCATIONS PRO TANTO either alter the quality of the estate, or diminish the quantity of the thing devised.

CONVEYANCE OF PART OF PROPERTY DEVISED is a revocation *pro tanto* only.

APPEAL from the probate court. The opinion states the case.

By Court, AIKENS, J. This is an appeal taken by the heirs at law of Asaph Sheldon, deceased, from a decree of the probate court for the district of Manchester, approving his last will and testament. An objection was taken on the hearing to the legality of the allowance of the appeal. The arguments urged on this point would have been properly addressed to this court on the occasion of the allowance; and, no doubt, were then urged and duly considered. Finding the cause on the docket, and the appeal to have been allowed on petition of the heirs, at the last term of the court, I consider that point as *res judicata*, and do not feel myself at liberty to review it. It appears from the will itself, which bears date the seventh of March, 1816, that the testator, being then a widower, and owning two farms, one of which he denominated his "home farm," and the other the "mountain farm," and being possessed, also, of some considerable personal estate, after directing his just debts and funeral charges to be paid out of his personal estate, bequeathed the remainder of his property as follows:

"Secondly. I give to the natural heirs of my adopted daughter Sylvia, wife of Rix Kinne, of her own body begotten, the home farm on which I now live, being the farm purchased of the Rev. Increase Graves, together with about eight acres lying on the west end of said farm, with all the buildings and appurtenances thereto belonging. Also I give to the said heirs of my said adopted daughter all and singular of my personal estate and household furniture, and the wearing apparel of my wife Abiah, late deceased, above what is necessary to pay my just debts and funeral charges, excepting only my own wearing apparel. And I do hereby order that all and singular of the above described property both real and personal shall, at my decease, come into the hands of my executors hereinafter named, and by them to be used for the necessary maintenance and education of the said heirs of my said adopted daughter during their minority; and also to allow from time to time to my said adopted daughter Sylvia, out of the above described property, so much as shall

be necessary for her maintenance during the minority of her said heirs. And when the said heirs of the said adopted daughter shall become of full age, what shall then remain unexpended of the above described property shall be equally divided between them, their heirs and assigns forever.

“Thirdly. I give to my nephew, Asaph Sheldon, jun., son of Ezra Sheldon, the farm where I formerly lived, called the mountain farm, and all my wearing apparel, to be his and his heirs’ and assigns’ at my decease.” He then proceeded to nominate the appellees executors of the will, and revoke all other wills made by him. It is admitted that the will was freely executed, and that the testator was of sound and disposing mind at the time. The heirs now appear and show cause against the affirmance of said decree, and for cause say, that since the signing and publishing of the said will, the said Asaph in his lifetime revoked the same as his last will, testament and devise, and has sold, conveyed and alienated all the real and personal estate therein mentioned, to wit: at Rupert, on the first day of January, 1821, which they offer to verify. In support of this allegation they have proved the following facts:

1. That on the first of April, 1817, the testator sold and conveyed the mountain farm to two men by the name of Farrer, for the consideration of one thousand seven hundred dollars.

2. That on the ninth of June, 1817, he entered into a written contract with Olive Spencer, in contemplation of marriage with her, in which he secures to her the absolute use, control and disposition of her own property, and also covenants that she shall at all times, both in sickness and health, be entitled to a full support and maintenance, out of his estate, during her natural life, without using anything in her support that was hers before her intermarriage with him; but that all her wants are to rest on him and on his estate. Which maintenance she agrees to accept of him in dower in case she should survive him. That the contemplated marriage was afterwards solemnized, and that she did survive him.

3. That in the course of the year 1818, he addressed three several letters to his nephew, Asaph Sheldon, jun., who was then residing at Adams, in the state of New York, in which he states in substance that he is old and in trouble, having nobody to carry on his farm, and urges his nephew with great earnestness to break up at Adams and come and live with him, and take care of him; represents to his nephew that he will secure to him the one half of the home farm, which he states is worth

three thousand dollars. That if the one half is not enough he shall have more. Desires his nephew to sell off his wooden ware; says that he has a plenty of beds and bedsteads, and iron ware, and that he should have of them. That in consequence of these repeated requests and proposals, his nephew did come and reside with him.

4. An indenture of lease and conditional sale executed between the testator and his nephew, dated the twenty-first of January, 1819, by which he demises to his nephew the one half of the home farm forever, and the other half during the natural lives of himself and his wife Olive, and the life of the survivor of them; for the consideration and upon the condition that his nephew shall well support them, and each of them, during their respective lives. The lease to become void on a failure to comply with this condition. It is mutually covenanted in this lease, among many other things, that on the decease of the survivor of Asaph Sheldon, sen., the testator, and his wife Olive, the nephew shall render peaceable possession of that half of the farm which is leased for their lives, to the legal executor or administrator to the estate of the said Asaph, senior, that may be appropriated to the use and benefit of the heirs of the said Asaph, senior.

5. A receipt dated April 19, 1821, executed by Nathan Burton, who is one of the executors named in the will, to the testator for two notes of hand of one hundred dollars each (being part of the avails of the "mountain farm"), expressed to have been received to collect and to appropriate, at the discretion of Burton, for the purpose of furnishing necessary clothing and education to the children of Sylvia Kinne, as they shall stand in need; the same or the unexpended balance thereof liable, however, to be recalled from his hands by the said Sheldon at any time during his life, if he should see fit.

And the question is, whether these several acts of the testator do in law amount to a revocation of the will *in toto*, or not. In deciding this question, I have looked into the authorities cited on the hearing, as well as many others, and have regarded with no small attention the nice distinctions of artificial reasoning and technical disquisition with which they abound. I confess I have not derived that aid from the examination which I anticipated. Revocations at common law were either express or implied; the latter are termed revocations in law, and might be effected in two ways: 1. By a total alteration in the circumstances of the deviser, and 2. By an actual or intended altera-

tion in his estate. I will here remark that in England a distinction is taken between those facts which may amount to an implied revocation at law and in chancery. No such distinction is admissible here. The judges of the supreme court are *ex officio* the judges of the court of chancery. Appeals from the probate court are directed to be carried to the law side of this court. And it would be ridiculous to thrust a party from that side of the court to which the statute has sent him for justice, and, at the same time, tell him that if he will approach us on the other side he shall receive it.

The statute of this state respecting revocations of wills and testaments, under which this question must be decided, is a literal transcript of the sixth section of the 29 Charles II. The construction of this clause of the statute, in England, has been that it leaves revocations by conclusion and operation of the law in the same state in which it found them. This construction obviously renders the important provisions of the section, in relation to revocations, altogether nugatory, except as to a particular mode of effecting an express revocation; whereas, the plain sense of the statute is that no revocation, except such as reverts *ex necessitate rei*, shall be effected otherwise than expressly, and that, too, in one of the modes therein pointed out. I am not prepared to go the length of the English decisions as reported on this subject. I feel bound to construe every constitutional act of the legislature in such manner as to give it full and complete effect. For certainly the constitutional statutes of this state are not to be annulled on the authority of any court. I can not admit that an alteration in the circumstances of the deviser will, in any case, amount to a revocation in law, or that an intended alteration in his estate will have that effect. It is time that the intention of the testator is to be principally regarded, but that intention is to be inferred from such facts only as the statute authorizes us to notice.

But to proceed on principles independent of positive regulations. Does the fact of a change in a man's circumstances afford a stronger presumption of an alteration of his intentions than the fact of his preserving his will unaltered and unrevoked, does of his intentions remaining the same. I confess I am unable to see it in that light. The statute has secured the rights of widows unprovided for, and of posthumous children. The necessity of the rule, if it exists in England is thus far obviated here. The only implied revocations, therefore, known to the laws of this state, are such as result *ex necessitate rei*. It is said by Justice

Buller, in his argument in the case of *Goodtitle v. Otway*, 1 Bos. & P. 615, that there is not a maxim in our law better established than this, that all implications are *ex necessitate*. That upon any other ground they would be capricious and arbitrary. Such a revocation may be either total or partial. If A. devise all his estate to B., and afterwards alienate the whole to C., it is necessarily a total revocation, for there is nothing for the will to operate upon. If he devise black-acre to B. and white-acre to C., and afterwards dispose of black-acre, it is a revocation *pro tanto*. Revocations *pro tanto* may operate either by altering the quality of the estate in abridging the interest in, or in diminishing the quantity of, the thing devised.

And the rule is the same in relation to personal estate. If a tenant in common devise, and afterwards make partition, the devise shall nevertheless stand: T. Raym. 240; 3 P. Wms. 170. So, if one seised of the entirety devise, and afterwards alienate an undivided moiety; for in both instances, the testator dies seised of the old estate, which he possessed at the time of the devise. It is not another and a different estate acquired in the same premises by a purchase subsequent to the devise. The case last put is precisely the case now in judgment. The perpetual lease of one half of the home-farm to Asaph Sheldon, jun., operates *ex necessitate rei* as a revocation of the will *pro tanto*. And the lease of the other half during the life of the survivor of the testator and his wife has the same effect *quoad* the term: Cro. Car. 23; Cro. Jac. 49. Even a mortgage in fee, is, at this day, regarded only as a charge upon the devise, and consequently only a revocation *pro tanto*: 1 Vern. 329; 2 Ch. 154; 2 Ld. Raym. 968.

It was contended in the argument that the covenant in the lease above recited is an absolute conveyance of the remainder of the devise, after the expiration of the life-lease, to the heirs of the testator, and that, therefore, there was nothing left for the devise to operate upon. This is inadmissible. A man can not legally convey his estate to his heirs generally by deed, to take effect after his decease. If such an instrument could have any effect at all it must be that of a devise. But the instrument in question has not the legal requisites to give it validity in that character. To permit it to take effect as a deed would be in violation of that most wholesome and equitable provision of the statute which gives to the creditor of a deceased person a lien upon his estate in the hands of his executors or administrators. This instrument is a writing, signed by the testator,

and is certainly expressive of an intention that the estate should pass to his heirs instead of the devisees. But it can not operate as an express revocation of the will. It was not executed with the legal formalities which the statute expressly requires in order to give it that effect.

After what has been observed, it is unnecessary to comment on the other facts in the case. I am therefore of opinion that the facts exhibited in evidence by the appellants do not, in law, amount to a total revocation of the will. It may be proper to remark, also, that this result appears to be in conformity to the principle of law as expressed by this court in 1819, in the case of *Parkhill v. Parkhill*, Brayt. 239.

The judgment of the court is that the decree of the probate court for the district of Manchester, approving the last will and testament of Asaph Sheldon, of Rupert, deceased, be affirmed, and that the appellees recover their costs.

IMPLIED REVOCATION OF WILLS.—Redfield, 1 Law of Wills, sec. 339, speaking of the effect upon a will of a change in the testator's estate, says: "This subject is very learnedly discussed by Aikens, J., in an early case, *Graves v. Sheldon*, and the following conclusion reached: That an alteration in the circumstances of the deviser will not, under any circumstances, amount to a revocation in law. If a part of the estate devised be conveyed by the testator it will amount to a revocation *pro tanto* only, and if the deviser convey the whole estate it is a revocation of the devise *ex necessitate*, and no revocation is allowable, by way of implication, except from necessity. We think such reasonable doctrines will meet with no resistance in this country."

COLLAMER, J., expressing the opinion of the court in *Blandin v. Blandin*, 9 Vt. 210, says: "In the case of *Graves v. Sheldon*, 2 D. Chip. 71, the doctrine of implied revocations or revocations at law is examined by the court and this conclusion deduced, that in this state, and under our statute, no will can be revoked, in whole or in part, but in the way pointed out by the statute, except from the necessity of the case, that is, when the testator has aliened the devised estate, and there is nothing for it to operate upon, in so far it is revoked." By this decision it was further determined that the purchase, after the execution of the will, of lands which would be included in the general description of the land devised, would not be a revocation of the will in whole or in part.

Upon the subject of the ademption of legacies and the revoking of a will by a subsequent disposal of the property devised, see *Walton v. Walton*, 11 Am. Dec. 456.

REVOCATION BY MARRIAGE AND BY BIRTH OF ISSUE. — By the common law the marriage of a man subsequent to the execution of his will was not of itself a revocation of the will in law. But if he had issue by the marriage this circumstance would work a revocation of the will: 1 Redfield on Wills, sec. 293. And such is the law as administered in Indiana: *Bowers v. Bowers*, 53 Ind. 430. By statute, however, in several of the states, the mere marriage of a man, though no issue be born to him, will revoke a previously executed will. Such is the case in Illinois: *Duryea v. Duryea*, 85 Ill. 41;

Am. Board of Foreign Missions v. Nelson, 72 Id. 562; *Tyler v. Tyler*, 19 Id. 151. The decision from 19 Ill. 151, proceeded upon a construction of the statute, which made the husband and wife heirs of each other. The court there adverting to the common law rule which required the birth of issue to revoke a will by implication, said that the reason of that rule which was adopted at common law for the benefit of the issue would equally apply to the case of a wife, who, under the statute, was rendered capable of inheriting. By the common law the wife was not the heir of her husband. To finally settle the question in that state, an act was passed, going into effect July 1, 1872, which provided that "a marriage shall be deemed a revocation of a prior will." Before this enactment took effect the marriage of a testatrix was consummated, which formed the ground of objection in *In re Tuller*, 79 Ill. 99. The testatrix in that case was a widow at the time she made her will, having then three children. She afterwards married, and the contestant of the will sought to impeach it on the authority of *Tyler v. Tyler*. The act of 1872 was laid out of consideration, it being held prospective only in operation. *Tyler v. Tyler* was carefully examined and distinguished from the cause at bar, in this, that in the latter there was no ground to presume the will revoked upon any presumed change of intention, inasmuch as the testatrix had, at the time of making the will and ever after, three children, the revocation would be no use to the subsequent husband, as he could not take the property. In *Duryea v. Duryea*, 85 Ill. 41, however, *Tyler v. Tyler*, was followed as authoritative and the principle reiterated, that the subsequent marriage of the testator must be regarded as a revocation, by operation of law, of his will previously made. Taking the same position is *Byrd v. Surles*, 77 N. C. 435.

The common law pronounced the effect of the subsequent marriage of a woman upon her previously executed will, to be different from that of a man. The reason of the distinction is thus stated in *Morton v. Onion*, 45 Vt. 145, 152: "It is the opinion of the court that the rule, that the marriage of a woman revoked a will made by her before marriage, rested for its reason on the fact that by virtue of the husband's marital rights, the woman becoming *covert* thereby became disabled to dispose of the property named in the will. The will ceased to be ambulatory. It is only in view of the supervening rights of the husband accruing by the fact of marriage, as to her property, that the rule had any ground or reason. The change of condition effected by marriage, as that expression is sometimes used, derives all its significance, as well as its operative force, as a revocation of the will, from the fact that peculiar rights accrue to the husband in respect to the property owned by the wife at the time of, or coming to her during her coverture." To the same effect, *Miller v. Phillips*, 9 R. I. 143; *Carey's Estate*, 49 Vt. 246. This reason of the rule was strictly applied to the facts of *Carey's Estate*, 49 Vt. 246, where it was determined that by the subsequent marriage of the testatrix, her will was revoked as to the personal estate, but left operative with respect to the realty.

The Rhode Island decisions hold generally that a revocation by marriage under their statute is presumptive only, not absolute, and that evidence of the acts of the testator, and circumstances showing clearly an intent that the will should stand ought to be admitted; and that the statute relative to this matter should be subject to the effect of circumstances proving a counter intent in the testator: *Wheeler v. Wheeler*, 1 R. I. 364; *Miller v. Phillips*, 9 Id. 143. Under the statute of New York, the marriage of a *feme-sole* is the same as a revocation of her will: *Lathrop v. Dunlop*, 6 Thomp. & C. 512; 4 Hun, 213.

Although, as has been stated, marriage and the birth of issue, at common law, revoke a prior will, yet it appears that in England this would not be so where the testator, before making his will, or contemporaneously with it, made express provision in writing for such future issue: *Kenebel v. Scrafton*, 2 East, 530. And this principle has been incorporated into the legislation of some of the states, as in California: Civ. Code, sec. 1298.

Whether the birth of issue after making a will would alone operate as a revocation, was a much debated question at the common law. The matter is now regulated by statute in England. But in referring to the difference of opinion that at one time prevailed, Buskirk, J., adopting the language of the surrogate in *Bloomer v. Bloomer*, 2 Bradf. 345, says in the course of his opinion, in *Hughes v. Hughes*, 37 Ind. 183, 185: "The ecclesiastical courts very early adopted the rule, that marriage and the birth of a child revoked a will as to personalty, and the same principle was ultimately, but not without a struggle, applied to devises of real estate. Finally it was held that it was not necessary that a subsequent marriage and birth of a child should both concur, but that the birth of a child alone, in connection with other circumstances, might be sufficient to raise an implied revocation." Upon a construction of their statute, it was determined in *Bloomer v. Bloomer*, that the subsequent birth of a child unprovided for by the will worked an entire revocation. A like decision was made under a similar statute in *Evans v. Anderson*, 15 Ohio St. 324. In Iowa it has been settled by judicial decision as well as statutory enactment that the birth of a child to a testator, before his death, but subsequently to the execution of his will, operates as an implied revocation thereof: *McCullum v. McKenzie*, 26 Iowa, 510; *Carey v. Baughu*, 36 Id. 543; *Negus v. Negus*, 46 Id. 487; *Fallon v. Chidester*, 46 Id. 588. The first case cited proceeded upon a consideration of general principles, in the absence of positive legislative provision. *Negus v. Negus* presented facts somewhat unlike those of the previous cases. There, the testator, at the time of making the will, had two children. But this fact was not considered to disturb the principles announced in *McCullum v. McKenzie*, and the birth of two other children after the execution of the will was pronounced a revocation.

Other cases proceeding on general reasoning and the authority of some early English adjudication, hold that birth of issue will revoke a will in whole or in part: *Sherry v. Lozier*, 1 Bradf. 437; *Sneed v. Ewing*, 5 J. J. Marsh. 472. But this entire subject is now generally regulated by the statutes of the various states. And although these enactments are not uniform, some providing that the birth of issue, unprovided for by the will, is of itself a revocation of the whole testament, others that the issue is allowed to come in and take with the other children, yet they so far settle many of the disputed questions as to render an examination of case law of less importance than formerly.

WASHBURN v. TRACY.

[2 D. CHIPMAN, 128.]

NEGLIGENCE CONTRIBUTIVE.—Although the defendant does not exercise ordinary care, no recovery can be had against him if the injury complained of would not have been sustained but for want of care on the part of plaintiff.

PERSON ON HORSEBACK should yield the road to one who is traveling in a vehicle.

REFUSAL TO CHARGE THE JURY on a point material to the cause, and upon which evidence has been received, is error.

ERROR to the Orange county court to reverse a judgment recovered against the plaintiff on error, who was defendant below in an action of trespass in the case brought by Tracy, the defendant in error, for negligently driving against and killing a valuable mare belonging to the defendant in error, while a minor son of the defendant in error was riding said mare along the highway. The evidence on the part of the plaintiff tended to show that at the time of the accident the defendant was driving along the highway at a dangerous rate of speed, while the boy was riding the mare slowly by; that the defendant did not check his horse, or attempt to turn aside, or take any other measures to avoid a collision, while the boy turned the mare to the right, but before he could get her out of the way the shaft of the wagon struck her; and that the injury was wholly due to the defendant's negligence. The evidence on the part of the defendant tended to show that the accident was due to the carelessness of the boy who was riding the mare; that he could have passed the defendant's wagon with safety but that he first turned to the left and afterwards reined to the right, directly across the road, and that the defendant immediately checked his horse, but before he could stop him entirely the shaft unavoidably struck the mare. The defendant asked a number of instructions to the general effect that the plaintiff could not recover if the accident was due in any degree to negligence or carelessness on the part of the boy who was riding the mare. These instructions were not given, but the court charged the jury in substance as stated in the opinion; and the jury returned a verdict for the plaintiff. The principal error assigned was in the instructions of the court.

Upham, for the plaintiff in error.

Nutting, for the defendant in error.

By Court, **SKINNER, C. J.** Several questions are presented by the bill of exceptions arising out of the charge of the judge; but in deciding the case, our attention has been confined to the point in relation to the duty of the court to have charged the jury upon the law as applicable to a case in which the negligence of the plaintiff or his servant may have caused or contributed to the injury complained of, which from the evidence

contained in the record, appears to have been pertinent in the case, and upon which the counsel for the defendant in the court below, requested the court to charge.

The plaintiff below charges the defendant with negligently and carelessly driving his, defendant's, horse in the highway, whereby the plaintiff's horse, upon which the plaintiff's servant was riding, in the same highway, was, by the shaft of the wagon drawn by the defendant's horse, killed. The plaintiff having shown in evidence facts from which negligence, want of care and diligence of the defendant might be inferred, and the defendant having shown in evidence facts from which the inference of negligence, want of care and diligence in the plaintiff's servant might arise, the charge of the court was, that if the jury found from the evidence before them that the defendant did not use common care and diligence in the management of his horse and wagon, at the time the injury happened, they would find for the plaintiff the value, etc.; if, on the other hand, the jury considered the defendant did use such care and diligence as prudent men generally use, they would find for the defendant; and with this direction, and no other, the court submitted the case; notwithstanding the counsel for the defendant requested the court to instruct the jury in the law arising from the supposed fact of the plaintiff's negligence. The court would not have erred in refusing if there had been no evidence tending to show that fact, or if the law arising from the fact would not have aided the defense; in the former case, the request would have been impertinent; in the latter, the defendant would not have been prejudiced. Although there may be cases in which evidence is given tending to prove a fact relevant to the issue, and of course proper for the jury to weigh; and where a verdict would not be set aside, or judgment reversed, for the neglect of the court to charge upon the point, not having been requested so to do; yet there is no doubt, according to the decisions of this court, and so is the law, that it would be error in the court below if in such case they should refuse on proper request: 2 Cranch, 239; 4 Id. 70, 71.

It appears, by the charge of the court, that the attention of the jury was directed exclusively to the conduct of the defendant at the time the injury happened, and they were instructed to return a verdict for the plaintiff, if they found from the evidence that the defendant did not use common care and diligence in the management of his horse and wagon. The charge

is clearly erroneous. From this charge it would have been the duty of the jury to have returned a verdict for the plaintiff if the defendant had not been in the exercise of ordinary care and diligence, although the injury might not have accrued thereby. It was further the duty of the court to have called the attention of the jury to the conduct of the plaintiff's servant, and to have instructed them, at least, that if but for the want of ordinary care and diligence in him the injury would not have happened, it would be their duty to find for the defendant; for the law is, that where the injury arises from the plaintiff's own misconduct, or want of ordinary caution, notwithstanding the defendant's neglect, etc., the plaintiff cannot recover: 11 East, 60; 2 Taun. 314.

It is ordinarily the duty of a person on horseback to give the traveled path to one who is traveling in a wagon or other vehicle sanctioned by common consent and immemorial usage. The bill of exceptions in this case contains much of the testimony given on the trial, and more than was necessary for the purpose of presenting the questions proper to be raised. Whether the weight of testimony is with the plaintiff or defendant is not for the court to decide, and the recent practice of burdening the record with the testimony is worse than useless.

The judgment of the court is reversed.

ROSS v. THE BANK OF BURLINGTON.

[1 ALLEN, 43.]

LAW OF THE CASE.—The court having decided that a complaint was good on special demurrer, will not hold it to be bad, on motion for arrest of judgment, based on the same grounds.

IF BANK NOTES BE DESTROYED, the owner may recover their amount from the bank in an action at law.

DECLARATIONS OF A PARTY may be evidence for himself, as a part of the *res gesta*, when they accompany and explain his actions, at a time when he could not have anticipated the circumstance which makes the declarations material.

NEW TRIAL will not be granted on account of an error or mistake in the instructions to the jury, which could not have altered the verdict.

ASSUMPSIT. The opinion states the case.

Heman Allen and Chas. Adams, attorneys for the plaintiff.

Samuel Prentiss, attorney for defendants.

By Court, HUTCHINSON, J. William D. Ross has declared

against the president, directors and company of the bank of Burlington, in four counts. The two first are special, and the two last general, for money had and received, and for money laid out and expended. The object of the suit is to recover about eight hundred dollars, which the plaintiff contends he ought to recover, on the ground that he was the holder and owner of that amount in bills of said bank, which were burnt and destroyed with and on board of the steamboat, on Lake Champlain, September 5, 1819. The last jury trial in said action was had upon the issue of non-assumpsit to all the counts of the declaration, and the jury found for the plaintiff said sum and interest, from the time a demand was made upon the defendants for the pay.

The cause has now been argued upon a motion in arrest, and upon a motion for a new trial. The ground for the motion in arrest is, that the verdict is general upon all the counts, and the defendants contend that the two first counts are bad. The court dispose of this question without deciding upon what might be its merits, under different circumstances. By inspection of the record, we find that this court has once decided those counts to be good, when met by a special demurrer. That demurrer, by leave of court, has been withdrawn, and the general issue pleaded, and a verdict given for the plaintiff on that issue. We are not at liberty to decide that the same declaration is bad after verdict, which this court has decided to be good on a special demurrer. The motion in arrest, therefore, does not prevail.

The motion for a new trial is predicated upon exceptions taken at the trial and allowed by the judges. By this it appears that the defendants' counsel objected in gross to the plaintiff's testimony, by which he offered to prove his declaration, but it was admitted by the court, and this court now consider it rightly admitted. If it is to gain credit at all, according to the view to be taken of it upon another point, it exactly proves the two special counts of the plaintiff's declaration, and, for aught the court can discover, equally proves the money counts.

When the defendants issued their bills, they received for them money or its equivalent; securities, perhaps, upon which they, in a short time, realized the money. The plaintiff paid to some person or persons the amount of these bills when he became the owner of them. This, as between the plaintiff and defendants, may be considered money paid by him for their benefit, and established the plaintiff's right to receive the

money of the defendants on presenting the bills at the bank for payment. If, then, these bills were destroyed while thus owned by the plaintiff, so that neither he nor any other person can ever present the same for payment, there is as strong an equity that he should recover the amount as there is that any note to an individual should be recovered of its signer after it is destroyed. Without such recovery the defendants, by such loss, would gain the whole amount of the bills; nor need the plaintiff apply to a court of chancery for relief, as contended by defendants' counsel. If his testimony make out his case at law, his remedy is good at law; and there being no cases found in which banks have been adjudged liable in such cases, or in which a similar question has been litigated, forms no valid objection against the plaintiff's availing himself of his testimony at law, when the analogy is so apparent between this case and the cases so often adjudged of individual securities lost or destroyed. Proving a loss only could not avail the plaintiff, because the bills being payable to bearer, the finder might present them for payment. The evidence offered and objected to in this case, if it proves anything, proves the destruction of the bills, so that the defendants can be holden only to the plaintiff for their amount. The admission of the plaintiff's testimony is, therefore, sanctioned by this court.

The next question that arises is, whether the plaintiff sufficiently proved, by proper testimony, that the bills were destroyed. Upon this point the testimony was heard and adjudged of by the court preparatory to the admissions of secondary evidence to prove the contents, and both parties seem well agreed that this was a correct course; and this court is now called upon to review their decision and decide whether there was sufficient proper testimony to prove the destruction of the bills.

The testimony of Cook is very full; that he delivered plaintiff eight hundred dollars in bills of the Burlington Bank on the third of September, and that the plaintiff told him he wanted them to send by the steamboat to Plattsburgh. Gould testifies that, at the request of the plaintiff, he applied to said Cook for said Burlington bills; his testimony and that of Delancy and Noble is strong to show that the plaintiff counted the money he had of Cook, made a package and addressed it "To the cashier of the Plattsburgh Bank," said it contained eight hundred dollars, and that he was about to send it by the steamboat. That he carried the package, so addressed and marked, to the steam-

boat; and the testimony of Captain Sherman shows that such a package, so addressed and marked, was delivered by the plaintiff to him, with directions that he should deliver it to said cashier. And it appeared that the plaintiff generally, to these several witnesses, spoke of the package as eight hundred dollars Burlington bills he was sending to Plattsburgh for exchange, and Sherman's testimony shows that the bills, or whatever was in that package, were burned in the steamboat cabin when said boat was burned.

Now it is contended that the sayings of the plaintiff are no evidence for him, and that, without these sayings, the testimony would be deficient in showing the loss or destruction. The court view these sayings of the plaintiff, accompanying and explaining his actions, and that at a time when he could not have anticipated the burning of the steamboat, as parts of the *res gestæ*, and as proper evidence in the action. It is not possible for us to suspect Ross of making those observations, at that time, in contemplation of the event that happened; and the strict coherence of the acts and matters proved, and the objects and explanations of those acts expressed by the plaintiff, forces the conviction that the same bills, received by plaintiff from Cook, were destroyed. The secondary evidence to prove the contents of the bills, was, therefore, rightly admitted. This virtually disposes of the request by defendant's counsel, that the court should charge that the testimony was insufficient to entitle the plaintiff to recover; for its sufficiency, so far as comes within the province of the court to decide, is above established.

But it is insisted that the plaintiff's demand was insufficient, because he did not identify the bills, nor furnish evidence that they were destroyed. If the bills were destroyed, it is not to be expected they could be identified otherwise than as to the amount and genuineness. Nor is any further identity of any importance to the defendants, for their bills circulate as money, and they redeem them by their amount without reference to their particular description further than to be sure they are genuine. It does not appear that any proof was furnished of the burning of the bills at the time of demand. The plaintiff informed defendants that eight hundred dollars of their bills, of which he was the owner, were destroyed. It does not appear that any objection was made at the time to the want of such proof, nor that any doubt was then entertained by the defendants on that subject; and the defendants making no such ob-

jection then, it is now too late to rest upon it. The court consider the testimony describes a sufficient demand.

Thus we dispose of all the points in the case, except those arising upon the charge actually given to the jury. It seems there must have been some mistake in expressing or in penning down the charge; for the court could not have intended exactly what is expressed upon paper. The case states the charge to be this: "The court having determined that eight hundred dollars, in genuine Burlington Bank bills of the denomination mentioned in the plaintiff's declaration, were destroyed on board the steamboat on the fifth of September, 1819, they (the jury) had nothing to do with the question whether the bills were destroyed or not, or the amount or genuineness thereof; and if they found, from the evidence submitted to them, that the plaintiff was the owner or holder of the bills, and that payment had been demanded in the manner proved, they would return a verdict for the plaintiff to recover eight hundred dollars, with interest from the time payment was demanded." It seems impossible but that the court should have seen that the amount and genuineness were proper questions for the jury. Indeed, the question left to the jury, of the plaintiff's being the owner or holder, implies the question as to the amount also; yet the court do not disturb the verdict on this account. In the first place, there appears to have been no litigation about the amount, on the trial before the jury, and, probably, the court treated that point out of dispute, because the parties did so.

But, secondly, the court consider they ought not to grant a new trial upon a point concerning which justice has been done, or on account of a mistake which could not have altered the verdict. We find that the court left to the jury the question whether the plaintiff was the owner or holder of the bills. Now, we conceive it impossible that a jury finding the plaintiff to be the owner, could, from the testimony, have found the sum any other than eight hundred dollars.

The new trial is refused, and judgment is rendered on the verdict, with interest to be added according to the rule entered into on respiting the judgment.

PRENTISS, J., being of counsel in the cause, did not sit.

CONANT v. SMITH.

[1 ALKENS, 67.]

PARTITION of land, valuable chiefly as an ore-bed, refused because the court could not ascertain the value of the different parts, and because the parties could obtain a less hazardous and more adequate remedy in chancery.

PETITION for partition. The opinion states the case.

Chas. K. Williams, for the petitioners.

Robert B. Bales, *contra*.

By Court, ROYCE, J. This is a petition for partition of a small piece of land, the value of which consists chiefly in an ore-bed, which for several years has been known to exist in a part of the tract. A suggestion is made that it may be difficult to divide the bed to advantage, and the scope and design of the petition seems rather to obtain an assignment of the defendants' share than an actual division of the estate. The situation and quality of this property is such as to justify the court in declining to order a partition or sale. The exact extent of the ore-bed is probably not yet known, and much less is the comparative depth and richness of its several parts. It would therefore be very hazardous to attempt a final division of the land itself and to order a division, in point of time, by directing the parties to improve the whole in succession, according to their interests, would operate to destroy all benefit to the owners of a small share. And then, to direct a sale of the defendants' share without their consent, though authorized by the statute, is against common right, and ought to be avoided, if equal or better justice can be obtained in another way. The court of chancery has powers to preserve the rights of the parties and avoid all these evils. They can regulate the enjoyment of this property between the owners by restricting them to the proportion of their respective interests, by compelling accounts between them and by appointing a common receiver for all parties. It is further to be recollected that the orders of that court are not necessarily peremptory and final, but may be altered from time to time, and suited to the varying state of the subject and condition of the parties. To that jurisdiction we must therefore refer the petitioners and refuse their present application.

[The opinion of the court on a motion to allow costs is omitted.]

BOARDMAN v. KEELER.

(1 ALLEN, 182.)

RETENTION OF POSSESSION OF CHATTELS by a vendor is a fraud in law, and makes the sale void as against creditors.

RETENTION OF POSSESSION BY DEFENDANT in execution, after a sale of chattels by the sheriff, is not a fraud in law, and will not vitiate the purchaser's title.

Writ of error. The opinion states the case.

A. Aldis, B. H. Smalley, Jas. Davis and A. Blodget, for the plaintiff.

B. Swift, Chas. H. Perigo, J. C. Thompson and J. Smith, contra.

By Court, HUTCHINSON, J. The only questions that arise upon this writ of error are, whether the county court erred in their charge, or in their refusing to charge, as requested; and whether it was error to let the trial proceed, when the court were unable to agree upon a charge, in point of law, there being two judges only in court, and they divided in opinion.

The division of opinion in the court prevented their charging at all, upon what is termed fraud in law, or distinguishing it from fraud in fact. The jury were charged, that if they found fraud in any part of the transaction, to find for the defendant; but if they found no fraud to find for the plaintiff. But no instructions were given them upon a point litigated by the counsel, whether the leaving the cattle that were once Campbell's, and sold to the plaintiff, by the sheriff, on an execution against Campbell; whether the leaving them on the farm of Campbell in the care of Anderson, once a hired man, and now a boarder at Campbell's, were a fraud or not. The plaintiff contends, that this was not a fraud in law; the defendant contends it was. The jury found for the defendant, and he contends they found fraud in fact. But it does not nor can it appear what sort of fraud they found; nor whether, what they called fraud was fraud. The court should have charged the jury one way or the other, upon the point on which they were disagreed, or suspended the trial till another term, on account of their disagreement. As the cause will be sent to another trial, it is proper this court should express their opinion upon the point on which the county court thus failed to charge. In ordinary cases of sales of personal property, the possession continuing in the vendor, is called a fraud in law, and makes the sale void, as against creditors. This court has more than once so decided, on the present circuit.

Those who see the property remains with its former owner, have a right to presume he is still the owner. The sale is not complete, as against creditors, till a substantial change of possession is effected.

Were this subject newly started, I should, for one, be disposed to apply the same rule to sheriff's sales. The reason is alike in both cases, except the notoriety attending the latter. This notoriety has introduced an exception in their favor. This was decided in the case of *Kidd v. Rawlinson*, 2 Bos. & P. 59, and has been followed by other cases, and must now be treated as settled law. The county court ought, therefore, to have charged the jury, that the leaving of the cattle, thus sold by the sheriff, in the care of Anderson on Campbell's farm, was not, of itself, a fraud in law that would vitiate the plaintiff's title. But if they should find the plaintiff's debt, for which said cattle were sold, fictitious merely, and made use of to cover the property of Campbell, and keep it from his creditors, that would be a fraud in fact, and would show the plaintiff to have no title to the cattle sued for; such instructions were not given.

The judgment of the county court is reversed, and the cause sent to the county court for another jury trial.

RETAINING POSSESSION OF CHATELS SOLD ON EXECUTION.—It seems to be almost universally conceded that when a stranger to the writ purchases and pays for property at an execution sale, the fact that he does not choose to remove it from the control of the defendant neither renders the sale fraudulent *per se*, nor, unless connected with other circumstances of a suspicious character, creates any presumption against its good faith: *Kidd v. Rawlinson*, 2 Bos. & P. 59; 3 Esp. 52; *Abney v. Kingsland*, 10 Ala. 355; *Latimer v. Batson*, 7 T. R. 106; *Anderson v. Brooks*, 11 Ala. 953; *Stone v. Waggoner*, 3 Eng. 204; *Perry v. Foster*, 3 Harr. (Del.) 293; *Pennington v. Chandler*, 5 Id. 394; *Greathouse v. Brown*, 5 Mon. 280; *Miles v. Edelen*, 1 Duvall, 270; *Walter v. Gernant*, 13 Pa. St. 515; *Dick v. Lindsay*, 2 Grant's Cas. 431; *Poole v. Mitchell*, 1 Hill (S. C.) 404; *Guignard v. Aldrich*, 10 Rich. Eq. 253; *Colman v. Bank of Hamburg*, 2 Strob. Eq. 285. The principle also extends to sales under distress for rent: *Walter v. McClellan*, 4 Dall. 208. In New York a purchase by a stranger to the execution was deemed fraudulent where for more than a year he allowed the defendant to retain possession and deal with the goods as his own: *Dickenson v. Cook*, 17 Johns. 332. But where there is no apparent intention to defraud creditors, the purchaser may, in that state, leave the goods with the defendant: *McInstry v. Tanner*, 9 Johns. 135. But when the plaintiff in execution becomes the purchaser, some of the American cases have considered that the necessity for a change of possession is as imperative as though the sale were voluntary: *Williams v. Kelsey*, 6 Ga. 365; *Farrington v. Caswell*, 15 Johns. 430; *Gardenier v. Tubbs*, 21 Wend. 169; but in England the question has been determined otherwise: *Watkins v. Birch*, 4 Taun. 823. We apprehend there can be no well-founded distinction between a purchase by the plaintiff, and a purchase by a stranger, to the execution, unless the circum-

stances of the sale, taken in connection with the continued possession of the defendant, produce the conviction that the writ was employed in bad faith for the purpose of withdrawing the property from the reach of other creditors without affecting the defendant's beneficial interest therein.

There is some doubt as to the true grounds upon which the exception in favor of sales under execution rests. Some contend that the notoriety of the sale furnishes a sufficient protection from fraud, and gives ample notice of the change of title. Others insist that the exception is justified by the fact that the sale is involuntary, and is made by the officers of the law. If the notoriety of the sale furnishes a sufficient reason for this exception, then it would seem that the rule ought to extend to other sales attended with equal publicity. Where debtors make assignments of their personal property for the benefit of their creditors, and the assignees thereafter, in pursuance of public notice, sell the property at auction, the purchasers may, according to a decided preponderance of the authorities, safely allow the goods to remain with the assignors: *Leonard v. Baker*, 1 M. & Sel. 251; *Woodham v. Baldock*, 3 T. B. Mon. 11; 8 Tann. 676; *Wyatt v. Stewart*, 34 Ala. 716; *Montgomery v. Kirksey*, 26 Id. 172; *Garland v. Chambers*, 11 S. & M. 337; *Ewing v. Cargill*, 13 Id. 79; *Joseph v. Ingraham*, 1 T. B. Mon. 189. But in Vermont, the authority of these cases is denied: *Rogers v. Vail*, 16 Vt. 327, and the exception which we are discussing is confined to purchases at sales made under legal process. Hence, where a constable sold property by consent of the defendant, not having legal process in his hands, the supreme court, by Redfield, J., said: "It is at present a well-settled principle of the law of this state, that sales of personal chattels are inoperative as against the creditors of the vendor. The case of sheriffs' sales has been considered an exception from the operation of this rule. It is not now necessary, and could not be useful, to go into the reasons of the exception. The cases upon the subject have followed in the track of *Kidd v. Rawlinson*, 2 Bos. & P. 59. The principal reasons there urged in favor of the determination are that the publicity and character of the sale rebut all inference of fraud. For myself, I think this exception rests more upon the fact that it is a transfer of title by operation of law, than upon its notoriety. It is the former rather than the latter which distinguishes it from sales by contract of the parties; for if all public sales were to form exceptions to this very salutary rule, it would doubtless cease to have any beneficial operation. Sheriffs' sales and all sales made by officers of the law, must be held *prima facie* good to transfer the title of the debtor. Now, no law and no practice requires such officer to make any delivery of the property. When he appears to have proceeded as sheriff, or other officer, and the sale is *in invitum*, it will be recognized as an exception to the rule. But where he really proceeds by consent of the parties, and in making the sale, acts as the agent of the parties and not as the minister of the law, his proceedings can not be allowed any greater force than those of any other auctioneer." *Kelly v. Hart*, 14 Vt. 53; *Laughlin v. Ferguson*, 6 Dana, 118; *Stephens v. Dana*, 7 Id. 257. The fact that sales by auction furnish no exception to the general rule: *Rankin v. Holloway*, 3 S. & M. 614; *Batchelder v. Carter*, 2 Vt. 168, strongly confirms the theory announced by Judge Redfield, and stated in the preceding quotation: See *Freeman on Executions*, sec. 151.

ROBINSON v. REYNOLDS.

[1 ATKINS, 174.]

WIFE, SUIT BY OR AGAINST.—A wife can not, on account of having a separate maintenance, or of the temporary absence of her husband, or of her separation from him, sue or be sued alone. She may, however, sue or be sued alone when the husband is in law *civiliter mortuus*, or is an alien who has never resided in this government, or where he is exiled or banished for life or has abjured the realm.

ACTION on book account. The opinion states the case.

A. G. Whittemore, A. Aldis and Jas. Davis, for the plaintiff.

B. Turner and B. F. Smalley, contra.

By Court, SKINNER, C. J. The facts disclosed by the pleadings in this case are that the goods, to recover the value of which this action was brought, were sold and delivered to and upon the sole credit of Sally Reynolds, one of the defendants, called the wife of Elisha Reynolds, the other defendant, previous to their marriage, viz., in October, 1816; that at the time of the sale and delivery of the goods she was the wife of one Joseph Emmerson, then living in Canada, which was known to the plaintiff; that Emmerson, a citizen born in the United States, left this state in 1812, and has ever since resided, and still resides, in Canada, furnishing no support to his wife, who has since the absence of her husband transacted business and contracted as a *feme-sole*.

In contemplation of law, by marriage the existence of the wife is merged in that of the husband, and it is a general principle that she can, during coverture, make no contracts by which she is bound, or sue or be sued alone. To this rule of law, that a married woman is incapable of suing or being sued, without her husband, there are excepted cases, and, so far as the principles which have controlled the decisions in such cases extend, the court feel bound to recognize them as the law here. Where the husband is accounted in law *civiliter mortuus*, the wife may sue or be sued alone, as where the husband is exiled or banished for life or has abjured the realm. So, too, where the husband is an alien, having never resided in the government, she is capable of suing and being sued alone. But we believe there is no principle of law that will authorize her to sue or subject her to a suit as a *feme-sole* where the husband is a citizen or subject of the government, on account of her having a separate maintenance or of his temporary absence; that, living

separate and apart from her husband, with a separate maintenance, will not authorize the wife to sue or subject her to be sued as a *feme-sole*, is now well settled: *Marshall v. Rutton*, 8 T. R. 545.

In examining the cases that have been decided bearing upon the question upon which a decision is called for in this case, it will be found that, although there are some in which a temporary absence of a citizen or a subject would seem to have been a ground for considering the wife as a *feme-sole*, for the purposes of contracting, pleading and being impleaded, yet it is clearly opposed by the current of authority.

In the case of *Carrol v. Blencow*, 4 Esp. 27, decided at *nisi prius* by Lord Alvanley, where the husband was transported for seven years and was still absent, the wife was held liable, notwithstanding the seven years had expired at the time of pleading.

The case of *De Gaillon v. L'Aigle*, 1 Bos. & P. 357, in which the wife was held liable alone, is a case where the husband was a foreigner, and had never been in England. The case decided as above, viz., against the wife, by Lord Kenyon, at *nisi prius*: *Walford v. The Duchess de la Pienne*, 2 Esp. 554, is also a case where the husband was an alien, though he had been domiciled in England. In the case of *Franks v. The Duchess de la Pienne*, the decision of the same judge is as in the former case.

These are the cases upon which the plaintiff principally relies; but from examination it will be found, none of them come up to this case; and if the principle contended for can be extracted from them, it is not supported by any ancient authority, and is very clearly and fully refuted by subsequent decisions.

In the case of *Carrol v. Blencow*, the ground taken is, that the husband had abjured the realm. The case of *De Gaillon v. L'Aigle*, seems to have been decided much upon the authority of *Lady Belknap's case*, and that he was a foreigner. The case is clearly to be distinguished from *Lady Belknap's*; for although it is said by Buller, J., that it does not appear whether the husband was banished for one year, for five, or for life; in Co. Lit. 133, in treating of the ability of the wife to sue alone, the case is thus stated: "If by act of parliament, the husband be attainted of treason or felony, and saving his life, is banished for ever, as Belknap, etc., was, this is a civil death, and the wife may sue as a *feme-sole*. But if the husband, by act of parliament, have judgment to be exiled but for a time, which some call a relegation, this is not a civil death."

Justice Heath, who concurred in the opinion in the case of *De Gaillon v. L'Aigle*, says, in the case of *Farrar v. The Countess Dowager of Granard*, 1 New Rep. 81, that the former case proceeded much upon the ground of the defendant's husband being a foreigner; and Lord Kenyon, in the case of *Franks v. The Duchess de la Pienne*, says: "Had this been the case of an Englishman, who might be presumed to have the *animus reter-tandi*, it might be different." In the case of *Marsh v. Hutchinson*, 2 Bos. & P. 226, Lord Eldon, in giving his opinion, limits the right of the wife of an Englishman to sue as a *feme-sole*, and her liability to be sued as such to the cases of the civil death of the husband; and in this opinion, Heath, J., seems to concur; and on the subject of voluntary absence, says; "There is no case in which the wife has been held liable, the husband being an Englishman."

In the case of *Farrar v. The Countess Dowager of Granard*, 1 New Rep. 80, the wife was held not liable upon the ground that a temporary absence of the husband was not sufficient. In the case of *Hopewell v. De Pinna*, 2 Camp. 113, before Lord Ellenborough, where the husband had been absent twelve years at the time of pleading, and eleven years at the time of making the contract, the only question that was raised was, whether it was incumbent on the defendant to prove her husband to be living; and this having been proved, a verdict was taken for the defendant.

The decision in the case of *Kay v. The Duchess de la Pienne*, 3 Camp. 123, would seem to put this question at rest. The same Duchess de la Pienne, against whom Lord Kenyon had twice decided at *nisi prius*, is again sued (her husband being still absent), Lord Ellenborough remarks: "If the husband has never been in this kingdom, the wife of an alien, I think, may be sued as a *feme-sole*;" and he supposes it probable, the fact that he had once been in England was not distinctly brought to Lord Kenyon's attention.

The principles of this decision are the same that governed the court in the case of *Marsh v. Hutchinson*, though Lord Ellenborough goes still further, and denies the liability of the wife of an alien, who is absent, if he has once been domiciled in England; a distinction not taken in that case. The plaintiff was nonsuited, and at the ensuing term, the whole court concurred in the opinion of the chief justice, and refused a rule to show cause. The same principle is fully confirmed in the case of *Boggett v. Frier*, 11 East, 301.

The court can not listen to the suggestion that the husband, by three years' absence, has lost all right to reclaim the wife without her consent, nor will absence alone, for any length of time, deprive the husband of his legal rights as such over the wife. There is nothing in this case that shows the husband did not intend to return, at the time the plaintiff contracted with the wife, nor even now, excepting that the wife has taken another husband.

If the wife was not liable at the time of contracting, lapse of time can not make her so. Suppose the husband should return while the action was pending, could the plaintiff proceed with his action and imprison the wife? In the event of the return of the husband, it will hardly be contended that property acquired by the wife in his absence, would be beyond his control, or that she can be endowed. It is not perceived upon what principle the wife, for some purposes, may be considered as a *feme-sole*, and for others as *covert*.

Judgment, that the plaintiff's plea is insufficient.

PINGRY v. WASHBURN.

[1 AIKENS, 264.]

ORDER OF PROOF.—The party on whom rests the burden of proving any fact, must first proceed with evidence for that purpose, and, if no testimony is given tending to disprove the fact thus sought to be established, no further testimony will be received upon that point.

IMPAIRING CORPORATE RIGHTS.—The legislature can pass no act impairing the rights or privileges of a corporation opposed to the original grant, without its consent.

AGREEMENT AGAINST PUBLIC POLICY.—An agreement to grant certain privileges, in consideration of the withdrawal of the opposition to the passage of an act through the legislature, is against public policy, and void.

PASSING TOLL-GATE.—A person who has paid toll, or who is exempt from payment thereof, has the right to open the gate and pass through; but he must not commit a breach of the peace in so doing.

WRIT of error. Washburn, the treasurer of the Green Mountain Turnpike company, brought an action on the case to recover the penalty for forcibly passing a turnpike-gate without having first paid toll. The third section of the act of incorporation provided, "that no person shall be obliged to pay any toll at either of said gates, who shall be going to or from public worship, or to or from any grist-mill or saw-mill, or on any militia duty, or on the ordinary domestic business of family

concerns." It appeared that the defendant drove up to the toll-gate one evening, announced to the toll-gatherer that he had been to the mill, refused to pay toll, and drove through the gate. Evidence was offered to prove that Pingry had been to the mill. It also appeared that he had passed through the gate in the morning without paying. Defendant claimed further, that the road was then free, by reason of an act empowering the company to alter and resurvey their road, on condition that it should be free to the inhabitants of the town where the defendant lived. A deposition was offered in evidence, and was received, although it stated that it was not taken in court, as provided by statute, for the reason mentioned in the deposition of deponent's bodily infirmity. After the defendant's evidence was in, plaintiff called the deponent as a witness, and proceeded to examine him in chief. This was objected to, but the deposition was withdrawn, and the witness permitted to testify.

The defendant prayed an instruction to the jury to the effect that, as he was traveling on domestic business, he was allowed to go free; but the court refused the instruction, and directed the jury to find for the plaintiff, unless the defendant proved that he was entitled to the privilege, by reason of the nature of his business; that he had given notice of and claimed such privilege before passing, and that it was necessary that such notice should be given at each time of passing. Defendant excepted, and, the verdict being for the plaintiff, prosecuted this writ of error.

H. Everett, for the plaintiff in error.

R. Washburn, *pro se*.

By Court, *SKINNER*, C. J. For the purposes of correct and regular proceeding, and as far as possible of placing the claims of parties upon equal footing, in the trial of causes, all courts are presumed to have adopted certain rules applicable to the order in which the testimony shall be given. The rule is, that the party on whom rests the burden of proving any fact shall first proceed with evidence for that purpose, and if no testimony is given tending to disprove the fact thus attempted to be established, no further testimony will be received upon that point. A departure, however, from this course in the county court has never been held by the supreme court cause for reversing judgment, and unless the order of proceeding shall have been such as is evidently calculated to give an undue advantage it would not be the duty of this court to interfere.

The act of 1822, authorizing the company to resurvey and alter their road, and permitting the inhabitants of Mountholly to pass the gate free of toll, can have no effect upon the rights of a corporation, unless accepted by it. The legislature can pass no act impairing the rights or privileges of a corporation opposed to the original grant, without its consent. It appears from the case that the corporation, after this act was passed, proceeded to survey the ground but made no record of the survey, and have made no alteration in the road. We believe, therefore, there has been no acceptance on the part of the corporation and that the testimony was properly rejected.

The record shows that the defendant below offered to give evidence of a contract or agreement, between himself and the corporation, that if he would not oppose the passing of the act of 1822, the defendant and all the inhabitants of Mountholly should pass the gate toll free. Whether the testimony was rejected on the ground that defendant did not desist, or that he procured the conditions to be annexed to the act without the consent of the corporation, or that the contract was against sound policy, does not appear; but that such contract is against sound policy, prejudicial to correct and just legislation, and, of course, void, is not to be questioned.

Depositions are, by our statute, admitted as evidence contrary to the rules of common law, and they are a kind of testimony not highly favored. A strict and literal compliance with the statute is necessary, and the courts have refused to permit parties to avail themselves of such testimony, although the forms required may have been strictly pursued, where there has been any deceit or fraud practiced in the taking.

It is insisted that the certificate of the magistrate is conclusive; this is not agreeable to the practice in this court, nor is it correct. If the certificate is defective, parol testimony is not admitted to supply the omission. The magistrate, in taking testimony to be improved in court, is acting in the character of an agent of the court, and no deceit practiced by him, or upon him, will be sanctioned.

If the cause certified for taking the deposition is the sickness of the deponent, or that he is going out of the state, would not the court hear testimony of his being present in court at the time of the trial? Or would they permit a deposition, taken in Woodstock, to be read, though certified to be more than thirty miles from the place of trial?

The withdrawing the deposition and improving the deponent

afterwards, as a witness upon the stand, might perhaps cure the error, if the case showed the oral testimony to have been the same as contained in the deposition. But in recurring to the record, it appears that the testimony given on the stand was in addition to the facts contained in the deposition, and the judge in charge refers the jury to the deposition as testimony. We are not, however, inclined to rest the opinion wholly upon this point.

The defendant below was, by reason of his employment at the time he passed the gate, exempt by the statute from the payment of the toll. The manner of passing in the morning, as appears from the case, was unquestionably such as to subject a person to the penalty for forcibly passing the gate, who was subject to pay toll. It was the duty of the defendant to have given notice of his exemption; and the toll-gatherer would have been justified in resisting forcibly, without such notice.

But we consider the penalty does not attach to any one who is not liable to pay toll. If a person has paid toll, he has a right to open the gate and pass, so that he does not commit a breach of the peace; and if he breaks the peace, although the law will inflict punishment upon him, yet not by imposing the penalty given by this statute. A conviction under the statute would be no bar to a prosecution for breach of the peace. The same principle will apply to the person who has commuted for a given period, and must also to a person who is exempt from toll by the proviso to the third section of the statute.

There is, therefore, error in the judgment, etc., and the same is reversed.

MAZON v. FOOT.

[1 ALLEN, 282.]

RETURNING TO THE STATE publicly by a debtor, with the intent to permanently reside therein, although in a part distant from his former residence, is a returning or coming within the state within the meaning of the statute of limitations, though unknown to the creditor. So, if the return, though temporary and without intent to remain, is known to the creditor, and is such as to give opportunity for the arrest of the debtor.

MOTION for a new trial in an action of debt on a judgment. The opinion states the case.

Dorastus Wooster and S. S. Phelps, for the plaintiffs.

Daniel Chipman and Geo. Chipman, contra.

By Court, SKINNER, C. J. In this case we are called upon to give a construction to that part of the tenth section of the statute of limitations, which excepts from its operation actions against debtors absent from the state at the time the cause of action accrues, and by which, "after such absent person's coming or return within the state," the same time is limited for bringing the action as in other cases. The case shows that at the time the cause of action accrued, the defendant was a resident in the state of New York, and the plaintiffs in this state; that within eight years from the time the cause of action accrued, the defendant had in two instances come to the town of Middlebury, in this state, and remained there publicly several weeks; and from these facts the court instructed the jury that the defendant was not entitled to the benefit of the statute.

It can not be supposed, nor does the defendant insist, that every coming or return into the state would set the statute in operation. He admits it must be such as that, by due diligence, the creditor might cause an arrest.

If the debtor should remove or return into the state publicly, and with a view to dwell and permanently reside within its jurisdiction, although in an extreme part from the place of his former residence, or that of the creditor, this would undoubtedly bring the case, by a correct construction of the statute, within its operation, though the creditor should have no knowledge of his return. So, too, if the debtor, having no intention to reside here, comes or returns into the state, and this is known to the creditor, and he has opportunity to arrest the body, the case is brought within the statute. In the latter case, it is necessary the creditor should be apprised of his debtor's being within the jurisdiction of this state; and the only question in the case before us is, were the jury at liberty to presume such knowledge in the plaintiff from the facts produced on trial? We believe no such legal inference would arise. It would be dangerous to adopt it as a rule, that the residence of the creditor in an adjoining town to that in which his debtor may have been for a short period, would raise a presumption that the creditor knew the fact, and it would be difficult to say what facts should afford such presumption. Within what distance of the creditor's residence the debtor shall come, how long he shall remain, and how publicly he shall sojourn, cannot be settled by any general rule. We therefore believe the only safe and practicable rule is, to require proof of actual knowledge, where the residence is only temporary.

Motion denied and judgment on the verdict.

BLAKE v. HOWE.

[1 ALKENS, 306.]

TENANT AND SUB-TENANT must deliver up possession to the landlord before either can assert an outstanding title or one purchased by him.

TAX SALE, WHO MAY ACQUIRE TITLE BY.—A tenant in possession who is under obligation to pay the taxes, can not acquire title to the premises by a purchase at a tax sale made in his own name, or in the name of another person for his benefit; and it seems that a title so acquired would remain void in the hands of a *bona fide* purchaser without notice.

NEW TRIAL ON GROUND OF SURPRISE will not be granted unless it appears that the moving party was injured by the surprise, and that, if a new hearing be granted, he can make out a good cause of action or defense.

EJECTMENT. The opinion states the case.

Nicholas Baylies and Wm. Upham, for the plaintiff.

Samuel Prentiss and O. H. Smith, contra.

By Court, HUTCHINSON, J. This is an action of ejectment for an undivided half of a mill-lot and privilege in the town of Moretown. It has been tried upon the general issue, and the plaintiff obtained a verdict. The court are now called to a revision of the point decided at the trial, which appears in the exceptions then taken and allowed; also to decide upon a motion for a new trial urged on the ground of an alleged surprise upon the defendant in the testimony of one Stephen Pierce, whose testimony is summarily detailed in the exceptions.

It is proper to preserve the separate nature of these two questions, and not confound them, at all; the first depending upon strict right, and the other being addressed to the sound discretion of the court, upon an equitable as well as a legal view of the cause. Upon reading the exceptions and the copy of the lease from the plaintiff to one Cephas Carpenter, made a part of the case, the plaintiff's *prima facie* right to recover and be let into the possession, as tenant in common with the owner of the other moiety of the premises, is put at rest. The defense set up supposes that the plaintiff had made out sufficient title to drive the defendant in his defense to set up a better title.

It is probably of but little consequence in the present action who owned the other half of the premises; but the case shows that the defendant had a right to possess that by title derived from Jonathan Arms, and that the plaintiff, before the commencement of this action, had requested the defendant to let him in as tenant in common, which the defendant refused.

It appears by the case that the defendant offered evidence

to show that the title to the moiety of the premises now claimed by the plaintiff was not in the plaintiff, but in one Brigham Howe, under whom the defendant claims to hold the same. This evidence was objected to by the plaintiff, and excluded by the court. This is the decision we are called upon to revise, and its correctness or incorrectness depends upon the question whether the defendant stood in a situation which entitled him to set up an outstanding title, or purchase of such title, to screen himself from resigning the possession of the premises to the plaintiff.

It appears by the testimony of Stephen Pierce, that Cephas Carpenter procured C. P. Van Ness to bid off the premises when sold for the direct tax, and also procured said vendue purchaser to convey the same to the witness, Pierce, to secure a debt due to him from Carpenter; that he informed Jones of this, and that Jones made an agreement with Carpenter, by reason of which Pierce conveyed the premises to Jones and Reed. It also appears by the case, that Jones deeded to the defendant, and that he took possession under that deed. By adverting to the lease from the plaintiff to Carpenter, which was upon record soon after its date, it appears that Carpenter was to pay all the taxes upon the premises during the continuance of his lease, for one of which taxes this sale was made. Now if the testimony upon these points is taken for truth, Carpenter attempted the grossest fraud upon the plaintiff, and, by this circuitous series of conveyances, would now take the whole avails to himself. But the law will treat the vendue deed as void from the beginning, it being procured by and for the benefit of him, who, as respects the plaintiff, was bound to pay the taxes and prevent a vendue sale. This is not all; the above testimony, if true, shows Carpenter holding under the plaintiff, Jones under Carpenter, though the deed in form was from Pierce, the trustee of Carpenter, and the defendant under his deed from Jones. This, in the view of the court, places the defendant in the place of Carpenter as to this moiety; the decision was therefore correct, excluding this testimony, for according to the authorities cited, and all the decisions with which the court have become acquainted, the tenant and subtenant must deliver up his possession to the landlord before he can shield himself with an outstanding title, or one by him purchased in.

If the testimony thus offered had been of a character to contradict the testimony of Pierce, or any other testimony of the

plaintiff, it ought to have been admitted. This, however, was not its character, nor was it offered for such a purpose.

But it is urged that the defendant, when he purchased, might safely rely upon the title which appeared of record, and was not obliged to learn or notice the circumstances now relied upon, which do not appear of record. The court, in answer to this, are not aware that a vendue deed, void in its conception and growth to maturity, was ever established in favor of a *bona fide* purchaser without notice. Yet, if such were the law, we should do injustice to apply it to a case like the present, where it seems the facts which would constitute the fraud were not at all enveloped in secrecy. Pierce tells all the particulars to his vendue. No one will suspect that C. P. Van Ness would hesitate a moment to inform at whose request he bid off the premises, and at whose direction he deeded. The defendant, then, while his ignorance alone can warrant a pretense for the application of the above principle in his favor, must be presumed to know a fact so easily learned. Notwithstanding this question, apparent on the exception, judgment must be rendered on the verdict.

We will now examine the question of surprise. The defendant contends he was surprised by the testimony of Pierce, and produces sundry affidavits to show his ability to gainsay that testimony on a future trial. The affidavits of Thomas Reed and Cephas Carpenter are offered by the defendant, and objected to on account of interest. The situation of Carpenter appears on the exceptions, and these show that he had the whole benefit of the sale to Jones and Reed; and if their title should fail on account of the badness of the title procured by Carpenter to Pierce, and that badness fully known to Carpenter, as now appears, there would be a remedy against Carpenter, either at law or equity, for the money he received on the sale. His interest is sufficient to exclude his affidavit.

Thomas Reed appears, and is admitted to be tenant in common, as to title, with Brigham Howe, under whom the defendant claims to set up his adverse title. It is contended that this only shows him to have an interest in the question, but not affected by the decision of this cause; therefore its effect is upon his credit, not his competency. By law the title of several tenants in common is *per my et per tout*, as the law provides, and a recovery by one in ejectment inures for the benefit of the other, for many purposes. It avoids the running of the statute of limitations, and the possession acquired or retained by the decision of such action, inures equally to the benefit of all. He could not testify on the trial if offered.

It is suggested, however, that the affidavits of interested witnesses may be used in motions for new trials. This is not correct with regard to the principal facts discovered and intended to be proved on a future trial. But, with regard to the fact, that the former testimony was a surprise, not being expected, or that the testimony relied upon is newly discovered, the affidavit of the party is admissible, and indeed, he is the only person who can make such affidavit. Both affidavits objected to are excluded. The other affidavits but faintly apply to the point in question.

But there is a view of this question that renders unnecessary any very critical examination of the weight of the testimony opposed to that of Pierce. The court have already suggested that this question is addressed to their sound discretion for the purpose of doing justice between the parties. Now the defendant ought, not only to show a surprise, but to show that he is injured by it; to show that, upon a new hearing, he can make out such title as would probably be not only a legal, but an equitable defense to the action. If he would claim anything on account of the title of Brigham Howe, he should show to the court what that title is. That, when adduced, may appear but another link in the semi-chain of title under the plaintiff. Or it may appear so wholly defective as to amount to no title whatever. It does not yet appear to the court, that the defendant has anything whatever to show, on another trial, which he did not in fact show on the former trial, except the testimony of those witnesses, whose affidavits the court have already disposed of. Upon the whole view of the case, the court direct that judgment be entered for the plaintiff, according to the verdict.

PRENTISS, J., being of counsel, did not sit in the cause.

WHO MAY PURCHASE AT TAX SALE.—It is a universal principle that one who ought to pay the taxes on property cannot, by omitting to do so, purchase at a sale of the property for the non-payment, and thereby strengthen his title. A purchase by one whose duty it was to pay the taxes operates as payment only; he can derive no benefit as against a third party by the neglect of the duty he owed to such party: *Gwynn v. McCauley*, 32 Ark. 97; *Jacks v. Dyer*, 31 Id. 334; *Fallon v. Chidester*, 46 Iowa, 588; *Weare v. Van Meter*, 42 Id. 128. *Allen v. Poole*, 54 Miss. 323; *McLaughlin v. Green*, 48 Id. 175; *Bertram v. Cook*, 32 Mich. 518; *Dubois v. Campau*, 24 Id. 368; *Lacey v. Davis*, 4 Id. 152; *Smith v. Phelps*, 63 Mo. 585; *Morrill v. Douglass*, 17 Kan. 291; *Carithers v. Weaver*, 7 Id. 110; *Busch v. Huston*, 75 Ill. 343; *Higgins v. Crosby*, 40 Id. 260; *Frye v. Bank of Illinois*, 11 Id. 367; *Willard v. Strong*, 14 Vt. 532; *Downer v. Smith*, 38 Id. 464; *Brown v. Simons*, 44 N. H. 475; *Varney v. Stevens*, 22 Me. 331; *Matthews v. Light*, 32 Id. 305; *Haskell v.*

Putnam, 42 Id. 244; *Coze v. Walcott*, 27 Pa. St. 154; *Reinboth v. Zerlee Run Co.*, 29 Id. 139; *Oldham v. Jones*, 5 B. Mon. 458, 467; *Miller v. Williams*, 15 Gratt. 222; *Smith v. Lewis*, 20 Wis. 369; *Frentz v. Klotz*, 23 Id. 312; *Edgarton v. Schneider*, 26 Id. 385; *Kelsey v. Abbott*, 13 Cal. 609; *McMinn v. Whelan*, 27 Id. 300; *Garwood v. Hastings*, 38 Id. 216; *Platt v. St. Clair's Heirs*, 6 Ohio, 227; *Douglas v. Dangerfield*, 10 Id. 152; *Williams v. Townsend*, 31 N. Y. 411. It is in determining upon whom a duty to pay the taxes may rest that the difficulty arises in applying this principle.

ONE IN POSSESSION.—The question has presented itself in many cases, whether the fact of possession at the time the taxes were assessed, of itself imposed such an obligation upon the tenant to pay the taxes as would disqualify him from purchasing at the tax sale. In considering this proposition, a distinction should be borne in mind between it and the case of one in possession under some contract by the terms of which he either was required to pay, or was released from paying, the taxes. The duty of one holding under such a contract is of course determined by the conditions thereof. Yet his relation towards the person stipulated to keep down such charges, may be such as would prevent his acquiring title to the land by bidding at the tax sale; for example, the relation of landlord and tenant, vendor and vendee in possession under contract to convey. In the case of mere occupancy either by an intruder or by an adverse claimant, the opinions of text-writers and of the courts have been somewhat confused. But recent decisions appear to adopt concurring views upon the subject. In *Douglas v. Dangerfield*, 10 Ohio, 152, one who had gone into possession under a tax deed which proved invalid, was precluded from relying upon a second tax title which accrued while he was in the occupancy of the land. And several Wisconsin authorities are to the effect, that one in possession of land under a claim of title, ought to pay the taxes, and cannot purchase at a tax sale: *Bassett v. Welch*, 22 Wis. 175; *Jones v. Davis*, 24 Id. 229; *Whitney v. Gunderson*, 31 Id. 379. In *Link v. Doerfer*, 42 Id. 391, a distinction is made which in a measure harmonizes the law of that state upon this subject, with that of others in this country. The distinction turns upon the nature of the possession. The purchaser at the tax sale took possession of unoccupied premises without color or claim of title, and so possessed them from his entry to the date of the tax deed. So far as the record discloses, he claimed no right in the premises before he took and recorded his tax deed. He appeared to have been a mere intruder; and it did not appear that the taxes for non-payment of which the lands were sold, had been assessed to him. In decreeing that such a possessor might purchase at the tax sale, the court say: "Though such naked possession is regarded as held in subservience to the legal title, and may subject the tenant to some form of action for the profits of the premises, yet it implies no privity of contract with the legal owner or duty to pay taxes; nor does it preclude him from acquiring adverse title to himself by tax deed or other conveyance." The court expressly state that had the tenant entered under a claim of title, and continued the possession and the claim so as to set the statute of limitations running, he would have been taken as the owner for the purpose of taxation, and that he could not be tolerated to claim ownership for one purpose and deny it for another. The purchaser was allowed to set up an adverse title commencing with his tax deed.

That the mere occupancy of land is not of itself sufficient to render one incompetent to purchase at a tax sale is decided in *Blackwood v. Van Vleet*, 30 Mich. 118, Judge Cooley saying that possession merely is not inconsistent with a state of facts that would impose the duty of paying the tax upon

some other. And in California the principle has been often reiterated, that to deprive a person of the rights of a purchaser, it is necessary that he should have been under some duty, legal or moral, to pay the tax. If the occupant was under no such obligation "there is no principle of law or equity which precludes him from purchasing at the sale, although in possession at the time the assessment was made or when the land was sold." *Moss v. Shear*, 25 Cal. 45. But it is equally well settled in that state that if, at the time of the assessment, the purchaser was in possession of the lot, claiming it, or some interest in it, and, by the terms of the assessment, it was assessed to him as a claimant, known or unknown, the purchase amounted to but a discharge of his obligation under the law. The possession under a claim of ownership is subject to taxation, and imposes on the occupant the duty of paying the tax levied on the property: *Reilly v. Lancaster*, 39 Cal. 357; *Barrett v. Amercin*, 36 Id. 323; *Bernal v. Lynch*, 36 Id. 135; *Coppinger v. Rice*, 33 Id. 425; *McMinn v. Whelan*, 27 Id. 318; *Kelsey v. Abbott*, 13 Id. 609. The fact that the lands were assessed and sold in the name of a particular person does not alone preclude his purchase of them at the tax sale if he was under no obligation to pay the taxes and they were assessed to him through no agency of his own: *Pleasants v. Scott*, 21 Ark. 370.

In *Barrett v. Amercin*, *supra*, the test is applied that if the possession is such as might ripen into a good title under the statute of limitations, the occupant had a taxable interest in the land. *Curtis v. Smith*, 42 Iowa, 665, presented these facts: The defendant claimed under a tax deed, which the plaintiffs sought to impeach on the ground that at the time of the assessment the defendant was in possession under a quitclaim deed from the same man from whom they derived title by a conveyance prior to the quitclaim deed. Actual occupancy was not made out. But the court said that the quitclaim deed conveyed no title to the defendant, and therefore imposed no duty on him to pay the tax; that if he was in possession under the quitclaim deed he was a mere trespasser, and not forbidden to acquire a tax title on the land. And, in conclusion, it is said that, "where possession is held, neither as a tenant, trustee nor agent of the land owner, it can be no impediment to the acquisition of a tax title upon the land." Citing: *Stearns v. Hollenbeck*, 38 Iowa, 550; *Hunt v. Rowland*, 22 Id. 33; *Thomas v. Stickle*, 32 Id. 71; *Smith v. Lewis*, 20 Wis., 350; *Bowman v. Cockerill*, 6 Kan. 311; *Coxe v. Gibson*, 27 Pa. St. 160; *Blakeley v. Boston*, 13 Ill. 708; *Lybrand v. Haney*, 31 Wis. 230, and the California authorities above quoted. See, further, for an instructive opinion upon this particular point, *Cooley on Taxation*, 350, 351, and *Blackwell on Tax Titles*, sec. 400. The doctrine announced in *Lacey v. Davis*, 4 Mich. 152, that one who enters upon land on which there is a charge for unpaid taxes can not purchase at the sale is questioned and disapproved in the subsequent decision of *Blackwood v. Van Vleet*, 30 Mich. 118. But in *Bowman v. Eckstein*, 46 Iowa, 583, an assignment of a tax certificate to one who, subsequently to the sale, but before the expiration of the time within which to redeem, had become the holder of the patent title, was held to operate not as a discharge from the lien of prior delinquent taxes, but as a redemption from the tax sale. From this opinion, however, two of the court dissented. It might be made a question whether the mere claiming title to land by one not in possession would of itself be sufficient to disqualify him from purchasing at a tax sale. It would seem, however, to follow, from the general principle of the owner's duty to pay taxes, that one could not claim ownership for one purpose and lose it when his obligations as owner were concerned.

MORTGAGOR AND MORTGAGEE.—In regard to the respective duties of the mortgagor and mortgagee to pay the taxes assessed on the mortgaged premises, the decisions are not uniform. As a general proposition, however, it may be safely asserted that a mortgagor can not, by acquiring a tax title upon the land, defeat the lien of the mortgagee: *Fuller v. Hodgdon*, 25 Me. 253; *Fair v. Brown*, 40 Iowa, 209; *Dayton v. Rice*, 47 Id. 429; *Stears v. Hollenbeck*, 38 Id. 550; *Frye v. Bank of Illinois*, 11 Ill. 367; *Avery v. Judd*, 21 Wis. 262. And the rule is the same with respect to parties claiming title under the mortgagor: *Fair v. Brown*, 40 Iowa, 209, citing *Porter v. Lafferty*, 33 Id. 254, and *Stears v. Hollenbeck*, 38 Id. 550. The reason upon which these decisions proceed is said in *Fair v. Brown*, *supra*, to be the obligation of the mortgagor or other party claiming under him to pay the taxes. But whether the mortgagor might not purchase at a tax sale of the premises where the mortgagee was in possession, receiving the rents and profits, and there was no stipulation in the mortgage that the mortgagor should pay assessments and taxes, is a question which, it is believed, has not received a judicial determination.

Although the decisions appear harmonious in stating the principle concerning the mortgagor's liability, the cases seem to be opposed on the power of the mortgagee to buy at a tax sale. In *Blackwell on Tax Titles*, sec. 399, it is laid down that the mortgagee can not acquire any title at a tax sale whereby the mortgagor may become barred of his equity of redemption, whether he is in or out of possession. To support this statement, *McLaughlin v. Green*, 48 Miss. 209, and *Brown v. Simons*, 44 N. H. 475, are referred to. In the first citation, the disability of the mortgagee to acquire any additional title under a tax deed, was based on the broad ground of his interest in the land as mortgagee; and a purchase by him was held to inure to the benefit of all parties interested. In the other decision, the mortgagee was in possession, and under such circumstances, Judge Bellows said, that the mortgagee "holds the estate with duties and obligations analogous to those of a trustee, and is bound to make necessary repairs. Indeed, by the entry and taking possession he assumes the duties of provident owner, and in the nature of bailiff to the mortgagor, is subject to an account for the profits: *Pow. on Mortg.* 464; 4 *Kent's Com.* 167; *Hughes v. Williams*, 12 Ves. 493, note a; *Hunt v. Maynard*, 6 Pick. 491. It is accordingly held that if such mortgagee procure the grant of a new term, after the expiration of the old one, it will be in trust for the mortgagor and redeemed with the principal: *Pow. on Mortg.* 97, 98, and cases cited; 4 *Kent's Com.* 167. So if he assign over his mortgage to an insolvent person he will be bound to answer for the profits still; for it is breach of trust to assign such pledge to an insolvent: 3 *Bac. Abr.* 658; *Pow. on Mortg.* 467, and cases cited. Upon these principles we think that Thayer, the mortgagee, could acquire no title to the property mortgaged, or any part of it, by the purchase at the tax sale while he was in possession, and taking the rents and profits; but we think it was clearly his duty to pay such taxes and add the amount to the mortgage debt." In *McLaughlin v. Green*, 48 Miss. 209, the court recognized the right of the mortgagee to be repaid the amount he had advanced at the tax sale, with interest.

The fact of the mortgagee's possession was pronounced a very important circumstance in affecting his right to purchase, in *Waterson v. Devoe*, 18 Kan. 223. There several decisions are reviewed, and the conclusion reached that "the cases that support the rule, that a mortgagee can not affect the rights of the mortgagor by purchasing the property at a sale for delinquent taxes accruing on the premises are either made in states where the common law prevails as to the character of mortgages, or in actions in which the mortgagee was in the actual possession of the premises." *Chickering v. Faile*,

26 Ill. 507, is quoted as adopting the common law idea that the mortgagee held the legal title, while the equitable right of redemption alone remained in the mortgagor. The authority from Kansas decides that a mortgagee not in possession is under no obligation to pay the taxes on the mortgaged premises, and was not debarred therefore from acquiring a title thereto by a purchase at the tax sale. *Williams v. Townsend*, 31 N. Y. 411, is cited to justify the opinion delivered. Judge Davis, in this case, does say that the mortgagee had no duty to perform to the mortgagor, or toward the mortgaged premises that precluded her from buying at the tax sale; and the language of the court seems to favor the doctrine that at least a mortgagee out of possession might purchase at a tax sale. *Williams v. Townsend*, is approvingly mentioned in *Sturdevant v. Mather*, 20 Wis. 576, 585. But in *Fisk v. Brunette*, 30 Id. 102, one who held lands under a written contract to convey upon the repayment of certain sums borrowed was deemed a trustee of the legal estate, and thereby rendered disqualified to purchase at a tax sale, or derive an additional title under tax certificates assigned to him. The comment of Judge Cooley in his work of *Taxation*, 347, 348, seems to us to indicate the just positions of the mortgagor and mortgagee in respect to the mortgaged premises and the payment of taxes thereon. "It can not be said either mortgagor or mortgagee is under no obligation to the government to pay the taxes. On the contrary, the tax being one that purposely is made to override the lien of the one as well as the title of the other, it might well, as it seems to us, be held that neither mortgagor nor mortgagee was at liberty to neglect the payment as one step in bettering his condition at the expense of the other, but that the presumption of law should be that the party purchasing did so for the protection of his own interest merely."

TENANTS IN COMMON.—As a general rule, no co-tenant will be permitted to assert against his companion a title acquired by purchase at a tax sale, for taxes imposed on their common property during their joint ownership: *Allen v. Poole*, 54 Miss. 323; *Busch v. Huston*, 75 Ill. 343; *Bracken v. Cooper*, 80 Id. 221; *Fallon v. Childester*, 46 Iowa, 588; *Weare v. Van Meter*, 42 Id. 128; *Maul v. Rider*, 51 Pa. St. 377; *Downer v. Smith*, 38 Vt. 464; *Dubois v. Campau*, 24 Mich. 360; *Phelan v. Boylan*, 25 Wis. 679; *Baker v. Whiting*, 3 Sumner, 475. Whether the fact of the tenant in common being out of possession affects his disability to acquire a title at a tax sale in derogation of his co-tenants' interest, was a question raised, but not disposed of, in *Dubois v. Campau*, 24 Mich. 368. But the court intimate that such a co-tenant is under no obligation to pay the taxes. The rule, however, is laid down in general terms as follows: "One tenant in common, without reference to the question of possession, can not procure the title of his co-tenants by purchasing in the land for taxes, a part of which were upon his own share, as such sale is based in part upon his own default: *Page v. Webster*, 8 Mich. 263; *Butler v. Porter*, 13 Id. 292. Of course, if such co-tenant procure another person to bid in the property for him and to take the deed, this will give him no greater right." A purchase by a co-tenant at a tax sale, operates as a payment of the tax. And the party making it has his remedy over for the proportion of the tax which his co-tenants ought to have paid: Cases above cited. Tax titles affecting undivided interests may arise from a sale which includes the interest of all the owners, or from a sale which includes the interest of but one. Where, as in the former case, the co-tenant purchasing at the sale is himself in fault for not making payment of the amount due on his own moiety, there is no doubt that his purchase can not be enforced against his companions, except as a basis for compelling them to reimburse him for

their *pro rata* of the sum paid to release the common property from a common burden: *Lloyd v. Lynch*, 28 Pa. St. 419, and other cases above cited. But where the purchasing co-tenant has paid his taxes, and is therefore free from fault, and there is nothing in the relations between the parties imposing any obligation on either to pay the charge upon the moiety of the other, then it is difficult to assign any reason for restraining the tenant not in default from bidding for his own use at a tax sale. A payment by any of the tenants relieves him from liability to loss through any subsequent sale. If any other undivided interest be sold, it must be deducted from the moieties of those who are in default: *Broker v. Devereaux*, 8 Paige, 513. If the parties whose interests have been released from the tax lien are free from all further obligation, and have no interests liable to be divested by the sale, then why should not they be permitted to bid as freely and with the same effect as though the sale were under an execution issued upon a separate judgment against the other co-tenant? See *Freeman on Co-tenancy and Partition*, secs. 158, 159.

In one state, at least, it has been decided that after the tax title has matured in the hands of a stranger, one tenant in common may acquire from the purchaser at the tax sale the title which he thereby obtains, and may hold the same as against his former co-tenants: *Lewis v. Robinson*, 10 Watts, 354; *Kirkpatrick v. Mathiot*, 4 W. & S. 251; *Reinboth v. Zerbs Run Improvement Company*, 29 Pa. St. 143. This opinion is based on the ground that when the title under the tax deed becomes absolute in the purchaser by the omission of the co-tenants to redeem within the prescribed time, all the former relations of the co-tenants with respect to the land are determined, and they stand in the position of strangers to one another. But this decision seems to be at variance with the well settled principle that a person under "any legal or moral obligation to pay the taxes, can not, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself or by subsequently buying from a stranger who purchased at the sale. Otherwise he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes:" *Moss v. Shear*, 25 Cal. 45; *Coppinger v. Rice*, 33 Id. 425. And in fact *Dubois v. Campau*, 24 Mich. 360, 370, apparently considers this precise question and comes to a conclusion different from that of the Pennsylvania authorities. Chief Justice Christiancy says: "But in a case where a party whose duty it is to pay all the taxes on the land, allows it to be sold for such taxes to a stranger who might hold the whole against all parties, though this may terminate the tenancy while such tax title is held by another, yet it has been terminated by the wrong of the party in default; and when he purchases in the title he and the former owners are remitted to their original position and rights as they stood had the taxes been paid when due, or had the sale for the taxes been made directly to such party in default. Such, we think, must be the result upon principle. There seems to be but little direct authority upon the precise question but by analogy: See 2 Bl. Com. 450; *Schutt v. Large*, 6 Barb. 373."

Nor can a tenant for life purchase and hold adversely to the remainder-man or reversioner: *Phelan v. Boylan*, 35 Wis. 679; *Varney v. Stevens*, 22 Me. 331; *Prettyman v. Walton*, 34 Ill. 175, 191; as it is the duty of the life-tenant to pay all taxes assessed on the land during his tenancy: *Johnson v. Smith*, 5 Bush, 102; *Arnold v. Smith*, 3 Id. 163; *Higgins v. Crosby*, 40 Ill. 261. This principle has been thus comprehensively stated: "It is the duty of such a tenant (one for life) to pay all the taxes assessed during his tenancy, and if he neglects it and suffers the land to be sold for the taxes, and purchases it him-

self, or suffers a stranger to purchase and then procures a release to himself, he can acquire no right to the estate against the owner in fee: *Blackwell on Tax Titles*, 472; *Varney v. Stevens*, 22 Ma. 361; *Young v. Hughes*, 5 Gill & Johns. 67; *McWilliam v. Robbins*, 5 Ohio, 28; *Cairns v. Chabert*, 3 Edw. Ch. 312; *Burhaus v. Van Zandt*, 3 Seld. 523; *Trustees of the Village of Elmira v. Dunn*, 22 Barb. 402; *Prettyman v. Ralston*, 34 Ill. 191, 192.

The relation of landlord and tenant is of such a nature as to disqualify either from acquiring title under a tax deed. Although it is the duty of the landlord to pay the taxes assessed in the absence of any agreement to the contrary between the parties: *Taylor on Land. and Ten.*, sec. 341; yet the tenant will not be permitted to take advantage of the omission of his landlord to pay the taxes, to terminate the relation between them and obtain title to the land: *Curtis v. Smith*, 42 Iowa, 665. The remedy of the tenant is rather to discharge the assessment himself and deduct the amount from the rent.

ONE PLACED IN A SITUATION OF TRUST and confidence, with reference to the subject-matter of a tax sale, can not take advantage of his position to purchase at the sale: *Williams v. Townsend*, 31 N. Y. 411; *Moore v. Titman*, 44 Ill. 567; *McMahon v. McGraw*, 26 Wis. 614; *Haskell v. Putnam*, 42 Ma. 244. This principle has been invoked to prevent an agent's holding under a deed given on the sale of his principal's land for unpaid taxes: *Oldham v. Jones*, 5 Mon. 458; *Bartholomew v. Leach*, 7 Watta, 472; *Matthews v. Light*, 32 Ma. 305; *Krutz v. Fisher*, 8 Kan. 90; *Kelsey v. Abbott*, 13 Cal. 609; *Bernal v. Lynch*, 36 Id. 135, 146; *Barton v. Moss*, 32 Ill. 50; *Lindsley v. Sinclair*, 24 Mich. 380; *Schedda v. Sawyer*, 4 McLean, 181. Nor can an agent justify his purchase on the ground that his principal did not furnish him with funds to pay the taxes: *McMahon v. McGraw*, 26 Wis. 614. But the fact that a person was the attorney of the deceased owner of the lands in certain suits, does not affect his right to purchase: *Pack v. Crawford*, 29 Ark. 489. One in possession of lands under a contract for their purchase can not buy the title at a tax sale: *Haskell v. Putnam*, 42 Ma. 244; *Voris v. Thomas*, 12 Ill. 442; *Oliver v. Crosswell*, 42 Id. 41; *Quinn v. Quinn*, 27 Wis. 168.

PURCHASERS BY OFFICERS conducting a tax sale are considered contrary to public policy, and as vesting in him no title by which he could hold the lands. A collector was held to acquire no title by his purchase at a tax sale, in *Chandler v. Moulton*, 33 Vt. 245, and an assignment of the tax certificates to the deputy treasurer, the transaction being a mere cover for his purchase, was pronounced voidable in his hands: *Ellis v. Peck*, 45 Iowa, 112. But the court did not allow this fact to impeach the title of a *bona fide* purchaser for value, from the deputy. *Taylor v. Stringer*, 1 Gratt. 158, on the other hand determines the title acquired by a *bona fide* purchaser from the deputy buying at the sale, to be void. Although, in *Yancy v. Hopkins*, 1 Munf. 419, 437, a sheriff making the sale was permitted to purchase, a subsequent statute rendered the sheriff and his deputies incompetent to acquire title under such purchase. The clerk at the auction has been pronounced not an officer making, or in any way controlling the sale: *Wells v. Company*, 47 N. H. 258; *Fox v. Cash*, 1 Jones (Pa.), 206; and sales to him sustained: See, further, *Blackwell on Tax Titles*, secs. 402-404.

BIDS BY THE STATE OR COUNTY.—“It is not an uncommon provision that if no bidders offer to take the land and pay the tax, it shall be bid in for the state, or for the county. A purchase on such a bid would give the state or county the usual rights of a purchaser and no more. Whether a deed would be requisite to carry into effect such a purchase, must depend upon the statute.” *Cooley on Taxation*, 352; see, also, *Blackwell on Tax Titles*, sec. 296. note a.

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[1 ALKENS, 314.]

DECISION OF COMMISSIONERS appointed to receive and examine claims against insolvent estates, is final on the rights of the parties unless vacated by appeal.

CONSTITUTIONAL LAW.—A special statute granting the right to appeal after the expiration of the time prescribed by law is void.

APPEAL from a decision of the commissioners of claims on the estate of a deceased, taken after the time prescribed by law for granting appeals in such cases, by virtue of a special act of the legislature entitled, "an act granting to Daniel Staniford an appeal from the judgment of commissioners on the estate of John Barry, late of Colchester, deceased, to the supreme court." The validity of the act was the point raised.

John C. Thompson, for the appellant.

Charles Adams, contra.

By Court, **PRENTISS, J.** The question raised on the motion to dismiss this appeal depends on the validity of the special act of the legislature under which the appeal was taken and entered in this court.

The validity of a similar act of the legislature was fully discussed in the case of *Bates v. Kimball*, 2 D. Chip. 77, and this question must be considered as settled by that decision. It was there determined that the judgment of commissioners appointed to receive and examine claims on an estate represented insolvent, unless appealed from within the time prescribed by law, was a final judgment, which fixed the rights of the parties, and could not be vacated or set aside by an act of the legislature. That decision is a direct authority that the act under which this appeal was taken is unconstitutional and void, as being an exercise of power by the legislature properly belonging to the judiciary, and as being in the nature of a sentence or decree rather than a law, wholly retrospective in its operation, and taking away a vested right. The case appears to have been maturely considered, and was decided on principles and authorities which are conclusive on the question. It is unnecessary, therefore, to enter at large into the question at this time. And we have only to add that the principles adopted in the case cited have become settled constitutional law, and are universally recognized and acted upon, as such, by all judicial tribunals in this country. They are found in the doctrines of learned civil-

ians and the decisions of able judges, without a single decision, or even opinion or dictum, to the contrary. They not only grow out of the letter and spirit of the constitution, but are founded in the very nature of a free government, and are absolutely essential to the preservation of civil liberty and the equal and permanent security of rights. The act under which the appeal was taken being unconstitutional and void, the appeal must be dismissed.

Appeal dismissed.

A SPECIAL ACT SUSPENDING THE STATUTE OF LIMITATIONS for the benefit of an individual is unconstitutional: *Holden v. James*, 6 Am. Dec. 174.

AN ACT GRANTING A NEW TRIAL is void: *Merrill v. Sherburne*, 8 Am. Dec. 52, and note.

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[1 ADKINS, 321.]

AUDITA QUERELA.—Any matter which might have been pleaded to the original action can not be the foundation of an *audita querela* to be relieved from the judgment.

DEFINITION.—“*Audita querela*,” is an equitable action, which lies for a person who is either in execution or in danger of being so, on a judgment when he has matter to show that such execution ought not to have issued, or should not issue against him.

MATTER WHICH THE DEFENDANT HAD NO OPPORTUNITY TO PLEAD, whether accruing before or after judgment, may be made available for his relief by the aid of the writ of *audita querela*.

INJURY ARISING FROM THE NEGLIGENCE of complainant can not be relieved by *audita querela*.

AUDITA QUERELA filed by Daniel Staniford against Hannah Barry, administratrix of John Barry, deceased. The substance of the bill was for relief against an execution issued by defendant under a judgment on a claim which plaintiff alleged was existing at the time their various disputes were submitted to commissioners, and reported upon by them. Plaintiff also alleged that he had entered his appeal by virtue of a special act giving him authority so to do. Demurrer and rejoinder.

J. C. Thompson, for the complainant.

Charles Adams, contra.

By Court, PRENTISS, J. It is unnecessary to notice the appeal taken by the plaintiff from the determination of the commissioners, under the special act of the legislature passed in

his favor, because we have already determined that act to be inoperative and void, and dismissed the appeal taken under it: *Staniford v. Barry*, 1 Aikens, 314 [*ante*, 691]. The rights of the parties, therefore, are unaffected by the act, and remain in all respects as they were before the act was passed. It may be observed, however, that if the act were valid, and the appeal had been sustained, the only effect would have been to vacate the judgment and determination of the commissioners, and leave the claims which subsisted between the plaintiff and the defendant's intestate, and not otherwise adjudicated, still open to litigation. It would not have affected the judgment, which is the subject of the plaintiff's complaint; for this judgment is separate and distinct by itself, and not at all connected with or dependent on the proceedings before the commissioners. If the plaintiff suffered the matter embraced in this judgment to be adjudicated in a court of law, and a recovery to be had against him, he is subject to the legal effects of the judgment; and it certainly is no reason why he should be relieved from execution of it, because he now chooses to have the debt brought into the general adjustment of claims on the appeal. He does not even allege that there is not a balance in favor of the intestate's estate, independent of this debt, or that he has any cross-demands to apply as a set-off against it; and when the matter alleged neither discharges the party nor shows that he is injured, it surely can not be heard as a ground of complaint.

Laying the appeal out of the case, we are to consider whether the remaining matter contained in the plaintiff's declaration is sufficient to entitle him to relief and enable him to maintain this action. Admitting the adjudication of the commissioners, in the adjustment of the claims between the plaintiff and the intestate's estate, to be a bar to the claim on which the judgment complained of was recovered, it might have been pleaded to the original action, and therefore can not be made the foundation of an *audita querela*, to be relieved against the judgment. Although an *audita querela* is authorized, and the form of the writ given, by statute, yet the cases in which it will lie must be determined by the rules of the common law. Sir William Blackstone says: "An *audita querela* is an equitable action which lies for a person who either is in execution, or in danger of being so; on judgments, when he has matter to show that such execution ought not to have issued, or should not issue against him, and is of a most remedial nature, and seems to have been in-

vented lest in any case there should be an oppressive defect of justice when the party has a good defense, but had not, nor has, any other means to take advantage of it. As if the plaintiff has given him a general release, or has received the debt of the defendant without entering satisfaction on the record. In such cases, in which the defendant has good matter to plead but hath no opportunity to plead it in the beginning of the suit, or after the last continuance, this writ lies in the nature of a bill in equity, to be relieved against the oppression of the plaintiff:" 3 Bl. Com. 405. Thus it lies for bail when the original judgment against the principal has been reversed, or the principal has paid the debt after judgment against the bail, or where there is judgment against a jailer for an escape, and then the first judgment is reversed: *Keyes v. Ive*, Cro. Jac. 645; Hob. 162. It is not necessary, however, that the matter upon which the complaint is founded should have accrued after the judgment; for if it accrued before, and yet the party had no opportunity to plead it to the action or to give it in evidence, he may have this remedy. As where, while a writ of error is pending, the plaintiff releases all executions, yet affirms the judgment and takes out execution, or where a party who obtains a verdict at *nisi prius* releases all actions and demands to the party charged by the verdict, and yet afterwards takes judgment upon the verdict and sues out execution: 3 Vin. Abr. 323. The principle on which these cases proceed is, that although the special matter occurred before judgment, yet the party had no opportunity to plead it; and it is on this principle that where a person is sued, and before the action is entered pays the debt, which the plaintiff receives in discharge of the action, yet afterwards enters the action and obtains judgment and execution, he may be relieved by this writ: *Lovejoy v. Webber*, 10 Mass. 101. The judgment in such case is fraudulently obtained, and the party is considered as having had no opportunity to plead the payment and discharge. But this remedy does not apply where the ground of complaint is matter which might have been pleaded or shown in bar of the judgment. And in no case where the party had time and opportunity to take advantage of the matter which he has in discharge of himself, and neglected it, can he be relieved by this writ; and he is deemed to have had this opportunity in all cases where it appears from the return of the officer that he had legal notice of the suit, unless the matter arose after the commencement of the suit and he was deprived of his opportunity by means which

bring the case within the principles before mentioned. Thus it is laid down, that where the plaintiff having obtained judgment against the defendant releases it, and afterwards brings a *scire facias*, and the sheriff returns *scire feci*, but the defendant does not appear, and there is judgment upon it, he can not have an *audita querela*, for he had time to plead the release upon the return of the *scire facias*, and having neglected it the law will not relieve him; and if in truth he was not warned, he has his remedy against the sheriff for a false return: *Wicket v. Creamer*, 1 Salk. 264; 1 Ld. Raym. 439; *Day v. Guilford*, T. Raym. 19; *Cooke v. Berry*, 1 Wils. 98; 3 Vin. Abr. 323; 2 Saund. 148, b. c. It is, then, a general and well settled principle, that when the party has had a legal opportunity of defense, or when the injury of which he complains is to be attributed to his own neglect, he can not be relieved by an *audita querela*. If, therefore, the defendant in the present case had no cause of action on which the judgment complained of was recovered, or the proceedings before the commissioners amounted to a bar, the plaintiff might and should have shown this in the original action; and not having done it, he has lost his opportunity and can not now be relieved. It may be further observed, that as the matter alleged as a defense, if available against the action, does not go to the merits, but is purely *stricti juris*, the rule of law applies to this case with peculiar and appropriate fitness. The plaintiff's declaration is clearly insufficient, and the defendant is entitled to judgment.

Judgment for the defendant.

THE PROCEEDING BY WRIT OF AUDITA QUERELA is superseded in a majority of the states by the more summary method of application for relief by motion upon notice to the adverse party: *Longworth v. Screven*, 2 Hill, (S. C.) 298; *McDonald v. Falvey*, 18 Wis. 571; *Smoe v. Dade*, 5 Rand. 639; *Dunlap v. Clements*, 18 Ala. 778; *Chambers v. Neal*, 13 Mon. 256; *Huston v. Ditto*, 20 Md. 305. And, as a general rule, wherever *audita querela* would lie at common law, relief may now be obtained on motion.

The writ of *audita querela* is a judicial writ founded upon the record, and directed to the court where the record remains: *Poultney v. Treasurer*, 25 Vt. 168. It has the usual incidents of a regular suit with its issues of law and of fact, its trial and judgment: *Brooks v. Hunt*, 17 Johns. 484. And the persons whose judgment is sought to be vacated must be made parties, and given notice: *Gleason v. Peck*, 12 Vt. 56. Besides being an appropriate remedy where some matter of discharge has arisen, the *audita querela* may be employed when a good defense to the action has accrued since the entry of the judgment, or where such defense, though existing prior to the judgment, was not brought to the attention of the court on account of fraud or collusion of the prevailing party: *Bryant v. Johnson*, 24 Me. 304; *Wetmore v. Law*, 34 Barb. 515. Where the defendant, during the pendency of the suit, paid the debt,

and the plaintiff afterward took judgments, it was held that this writ would lie: *Lovejoy v. Weber*, 10 Mass. 101. It has also been applied for the purpose of vacating a judgment against an infant who defended without appointment of a guardian: *Starbird v. Moore*, 21 Vt. 529. And a judgment against a lunatic whose guardian was not notified: *Lincoln v. Flint*, 18 Vt. 247. In Vermont it seems to be employed with more frequency than elsewhere, and to answer as a specific for all sorts of mischiefs not otherwise provided against. It there has power to vacate a judgment rendered after a suit is discontinued by agreement, or by failure of the parties to appear for trial or for irregularity: *Jenny v. Glynn*, 12 Vt. 490; *Pike v. Hill*, 15 Id. 183. Or in cases where a justice of the peace should have allowed an appeal, but refused to do so: *Edwards v. Osgood*, 33 Id. 224. It is the proper remedy when two judgments have been rendered on the same cause of action, and one of them is paid: *Browne v. Joy*, 9 Johns. 221. It is not sustained by error of the court in a matter of law or of fact: *Lamson v. Bradley*, 42 Vt. 165; *School Dist. v. Rood*, 27 Id. 214. And is never permissible in a case where a writ of error is proper by the common law, though the right to such writ has been taken away by statute: *Shear v. Flint*, 17 Vt. 497. But a party having an opportunity of making his defense, or who is injured through his own neglect, can not be relieved by *audita querela*: *Thatcher v. Gammon*, 12 Mass. 270; *Grinbold v. Rutland*, 23 Vt. 324. Nor can a party by *audita querela* obtain relief from a judgment rendered against him on the unauthorized appearance of an attorney: *Abbott v. Dutton*, 44 Vt. 551; *Spaulding v. Swift*, 18 Id. 214. An *audita querela*, like a motion to set aside a judgment, is only available in behalf of one who was prejudiced by the judgment at its rendition. If the party does not seek to avoid the judgment, his subsequent alienee will not be allowed to interfere with it: *Beard v. Ketchum*, 8 U. C. Q. B. 523. A party who has been discharged in insolvency, if he suffer default to be taken against him, is not entitled to have the judgment set aside for the purpose of pleading his discharge: *Faxon v. Baxter*, 11 Cush. 35. See Freeman on Judgments, sec. 95.

BROWN v. TURNER.

[1 ALKENS, 350.]

PARTITION.—A saw-mill, mill-yard, and mill-pond are not partible, and therefore are not proper subjects for partition.

PETITION for partition. The opinion states the case.

R. H. Blackmer, H. Hall and D. Robinson, jun., for the petitioner.

D. Church, contra.

By Court, HUTCHINSON, J. The petitioner claims to be owner of two undivided third parts of a saw-mill and utensils, and mill-yard and pond, etc., and shows in his petition how he derives title, to wit, by deeds from sundry persons, of the name of Pratt, and alleges that Amos Turner, the intestate, died

seised of the other undivided third part, and that the three petitionees occupy the same. The fair import seems to be, that they occupy jointly. The petition concludes with appropriate averments that he cannot use and occupy to advantage, and prays for a partition of the premises.

There are three pleas by the petitionees, on the two first of which issues are joined, and to the third there is a demurrer. This plea and demurrer present the only questions now to be decided. The substance of the third plea is that the premises are not partible, and that the petitionees use and occupy by turns with the petitioner, according to their right, that is, one third part of the time, and this as other and former owners have been accustomed to use said premises. It is unnecessary for the court to be particular in disposing of some questions relating to the form of allegation in the petition and plea. The petition sufficiently states a claim for partition, if the premises are partible, and the plea states that they are not partible, and are used by turns, etc., according to right, and as accustomed to be used. This presents the real merits of the controversy; can there be a partition of a saw-mill, and mill-yard, and pond, and utensils for a saw-mill, among different owners? Such a partition would destroy the whole. The using by turns, as the plea states the occupancy to be, is the only practicable mode in which such property can be occupied, and keep up at all the idea of several part owners, unless there should be literally a joint possession, and the net profits be divided, as might be done by appointing a common receiver. This disposes of the whole case, for the only prayer is for partition. But if the prayer in the petition were ever so broad, if it included an assignment to one, or a sale of the whole, the court would not deem it proper to make any such order, without different reasons from those which now appear. If the conduct of the petitionees were such that the petitioner could not have and enjoy his turn in the occupancy of the premises, it would bear a different consideration. There is no such complaint, and the controversy is alleged in the plea, and confessed by the demurrer.

The judgment of the court is, that the plea in bar is sufficient.

LITTLE v. COOK.

[1 ADAMS, 383.]

EXECUTION FOLLOWS AS A MATTER OF COURSE from the judgment and need not be specially awarded by the court; but when the clerk enters the judgment, technical form requires him to add "whereof he may have execution."

AUDITA QUERELA bears solely on the acts of the opposite party, and not at all upon the judgment of the court. If an error of the court has been committed the remedy is by writ of error, or by motion for a new trial.

▲ **DECISION UPON AUDITA QUERELA**, if in favor of the complainant, puts an end to the judgment, so that no further proceedings can be taken upon it. The complainant also recovers damages for the wrongful act complained of. The complaint sounds in tort, the proper plea is not guilty, and damages are recovered from the one who did the wrong.

AUDITA QUERELA. The opinion states the case.

Augustus Young and Joshua Sawyer, for the complainant.

Geo. O. West and Isaac Fletcher, contra.

By Court, **HUTCHINSON, J.** John Little complains, in his *audita querela*, that he appeared with his witnesses, the second term, for trial in his action against Cook, the cause appearing of record or by the docket minutes, to be open for trial; yet the court refused him a trial, and ordered judgment entered for Cook to recover his costs.

Also, that Cook has had his execution, when the court made no award of execution.

There is a general demurrer to this complaint, and joinder in demurrer.

The last charge above named, regards merely the form of the clerk's entering and recording the judgment. The court usually, when judgment is rendered, say nothing about the execution, nor is it necessary they should, for it follows of course. It is the right of the party recovering a final judgment, to have execution upon that judgment. And when the clerk records a judgment, technical form requires that he should add "whereof he may have execution." If the clerk should mistake, and omit this in his record, he should add it as soon as he discovers the defect, just as he would correct any other defect in his recording the judgment. Judgments must not be reversed for want of form in the recording. If the judgment was in fact according to the law of the case the court should direct the clerk to make his record show it to be so.

In relation to the charge in the complaint, that the com-

plainant was refused a trial, it appears probable, nor is it denied, that there was a hearing before the court the first term, and the court wanted to consider of the subject during vacation, and the continuance was really for that purpose, but the entry made by the clerk was general, without adding "for judgment." The second term, the court rendered their judgment, refusing to hear further upon the merits. If these were the facts, the complainant had no reason to expect a further hearing in the cause, nor could he become entitled to it by the general entry of the continuance by the clerk. Suppose the clerk, by some misunderstanding, had entered the continuance under a rule to be defaulted the next term, when the same was not authorized by any order of the court or consent of the defendant. Such an entry would deprive the defendant of a trial upon the merits, and of his appeal or review in the cause. Would the court in such a case suffer the defendant to be bound down by such mistaken entry? By no means. They ought from their own knowledge, or satisfactory affidavits, to ascertain the facts, and order the entry to be corrected according to the facts. In the present case the court must have known whether they had the subject under consideration, to form a judgment, and ordered a continuance for that purpose, or whether they ordered a continuance for a future trial; and it was their duty, the second term, to let neither party suffer by a mistaken entry of the clerk upon his docket.

But there is a different and a very conclusive answer to this objection. The counsel for the defendant have correctly urged that the process of *audita querela* bears solely upon the acts of the opposite party, and not at all upon the judgment of the court. The complaint should be, not that the court rendered a wrong judgment, or refused to render a correct one, but that the party has done so and so, not warranted by his judgment, or has imposed upon the court, and obtained a judgment without the complainant's having his day in court.

If, in the present case, the court had been of opinion that the defendant was not entitled to his execution when he obtained it, this complaint would have been a proper remedy; but, whenever the complaint is that the court did wrong, the party complaining must procure the facts to appear of record, either of course or by a bill of exceptions, and bring his writ of error, or, in some cases he may apply to the same court by motion for a new trial. In the last case the court may grant a new hearing *in toto*, and in case of the writ of error, the court of errors reverses the

erroneous judgment, and proceeds to render such a judgment as the lower court ought to have rendered. In both cases the action is kept alive in court till legal justice has been done. While, on the other hand, a decision upon an *audita querela*, which complains of a wrong judgment, if such decision is in favor of the complainant, not only puts an end to that judgment, but drives the action out of court, and there can be no more proceedings upon it. Moreover, the complainant in this process recovers of the opposite party his damages for the wrongful act complained of. The complaint sounds in tort, the proper plea is not guilty, and damages are recovered of the one who has done the tort. From all this it would seem to follow, that, if the wrongful act of the court is complained of, the complaint should be against the court, and the damages be recovered of the judges; for this no one will contend. This complaint is against the party recovering the judgment, and yet complains of the doings of the court in rendering that judgment. For such a case this is not the proper remedy.

The clerk will enter a judgment of the court, that the complaint is insufficient, and that the defendant recover his cost.

SKINNER, C. J., and ROYCE, J., were absent.

AUDITA QUERELA.—See note to *Stanford v. Barry*, *ante*, 602.

HOLDEN v. CRAWFORD.

[1 ALKERS, 300.]

RESCISSON.—Equity will, at the instance of heirs, relieve against a contract of sale of realty made by their ancestor if it appears that while not, strictly speaking, a *non compos mentis*, he was a man of weak mind, and that the consideration was so grossly inadequate as to leave no doubt that he must have acted under the influence of some strange delusion.

BILL in equity, praying a rescission of contract, and an injunction. The bill, filed by the heirs of Charles Holden, alleged that Holden, while of the age of seventy-two years, and while under guardianship, entered into a contract for the exchange of a house and lot in Westminster for a lot in Illinois belonging to Crawford, and five hundred dollars additional; that the Illinois lot was far inferior in value to that of Crawford's tract; that Crawford had entered upon a part of the Holden premises, and had commenced an action of ejectment to recover the residue. The defendant admitted the contract, but denied the grounds of relief.

Horace Everett, Daniel Kellogg and Asa Keyes, for the orators.

Though old age is not sufficient ground to presume fraud: 1 Ves. 19, 117, 63; and though weakness of mind may not be sufficient to support a commission of lunacy, it furnishes a strong ground of suspicion, and that persons in those states executing conveyances are acted upon by improper influences. And where fraud or surprise can be imputed or collected from the circumstances, equity will relieve: 1 Fonb. 60; Tothill, 101, 102; 2 Ch. Cas. 103; Finch, 161; 2 P. Wms. 270; 3 Id. 130; 2 Vern. 189; 2 Atk. 324; 2 Ves. 407; 10 Id. 223, 52; 13 Id. 103; 6 Bro. Ch. 9.

Wm. C. Bradley, P. White and Jona H. Hubbard, contra.

By Court, HUTCHINSON, Chancellor. Several grounds for a decree have been urged by the orators, among which one is that the deed from Holden the elder to Crawford is inoperative as against the heirs, on account of the guardianship under which he labored. This is answered by the affirmance that the guardianship was illegal and void, and if not, it had ceased by the departure of both guardian and ward from the state, by the restoration of the property to the ward, etc.

Were the cause to be decided upon this point wholly, the court might not be perfectly agreed in their opinion. Facts might exist which would furnish good reason for vacating the guardianship, and yet the same remain in force until vacated. And I, for one, should like, before a decision upon this point, to see a statute which is not before me and learn some further facts about the residence. But the court will not decide in favor of the orators upon this ground. Nor will the court treat the cause as if Holden were properly a *non compos mentis*, for the testimony does not sufficiently prove him such at that time. Nor do the court decide that the respondent was guilty of false and fraudulent affirmations in order to induce Holden to deed his farm and close the contract. The orators contend they have adduced evidence tending to prove this. The court have not taken time to compare and balance the testimony of both parties upon this point as they would do were the cause to turn upon it.

There is one ground on which the court are satisfied to decree against the respondent. It appears very plain that Holden was a very weak man, easily fascinated with some visionary project, and had but a very incorrect idea of the value of property. This Mr. Crawford must have known. The professed object of

Holden was not to turn himself and family out of house and home, but to enlarge his landed property and still retain a home. His weakness left him supposing he could effect this by changing his farm and buildings here for a tract of land much larger, to be sure, but lying sixty miles into the wilderness of Illinois, and for about money enough to transport him and his effects there. A project of this kind is always impracticable unless a sufficient number, including an assortment of mechanics, with property to erect mills, go at once and form some little society to relieve each other's wants while the surrounding country could be settled. Moreover, according to the testimony, Holden received less than half the value of his property. The average appraisal of Holden's property deeded to the respondent, by a multitude of witnesses on both sides, would exceed two thousand five hundred dollars; while reckoning the Illinois land at the fair market price here, which is the only price of which Holden could have been at all cognizant, or which a man in his circumstances could ever realize, Holden received less than one thousand one hundred dollars for his property. There is therefore no equality in this contract; no equality of consideration; no equality in the capacity of the contracting parties; none in the knowledge of the value of the property. Mr. Crawford must have known that Holden was deceiving himself with regard to the value of the property. It was an unconscionable bargain—one that the respondent ought not to have made—one that he can not equitably retain. The willingness proved of Mr. Crawford to rescind the bargain afterwards does not help the matter, for he must have then known that the weakness of Holden and his ignorance of the value of the Illinois property still continued, and that his infatuating charm remained unbroken.

When the son returned, who knew the value of the property, there could be no rescinding of the contract without application to this court.

The court, therefore, decree that the costs of this suit be taxed in favor of the orators against the respondent; that the interest be cast upon the five hundred dollars paid by said Crawford to Charles Holden, the deceased, from the time of payment till this time, and be added to the principal; that, from the amount thus formed, there be deducted said taxable costs; and that, on the orators paying the balance to the clerk of our said court for the benefit of said Crawford, on or before the first day of the next term of this court in February next, at this place, and also

making, executing, procuring and delivering to said clerk, for the benefit of said Crawford, his heirs and assigns, good and valid deed or deeds, revesting in him all the title to said lands in Illinois conveyed by said Crawford to said Holden, as set forth in said bill, with satisfactory evidence that the same are free from taxes assessed since the giving of said deed from said Crawford to said Holden; or, instead of said deed or deeds, shall pay to said clerk, for the benefit of said Crawford, the sum of five hundred and sixty dollars, being the value of said lands as now estimated by the court, together with said sum paid by said Crawford to said Holden, for taxes, being thirty-one dollars, and interest on the same to this time; the said Crawford shall, on or before the third day of the said next term of this court, execute and deliver to the said clerk, for the benefit of said orators, a good and valid quitclaim deed, conveying to the heirs of the said Holden the elder, now deceased, all the lands in Westminster so conveyed to him, the said Crawford, by said Holden, as set forth in said bill, free from all incumbrance accruing from any act or neglect of said Crawford since his said deed from said Holden, to hold to the said heirs and their heirs and assigns forever; and that, upon a compliance by the orators with this decree, the said Crawford, his heirs and assigns, be forever enjoined from any further pursuit of the said action of ejectment, or any other suit in law or equity for the recovery of said lands in Westminster.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

RALSTON v. MILLER.

[3 RANDOLPH, 44.]

INJUNCTION TO PREVENT COLLECTION OF PURCHASE-PRICE of real estate will not be sustained where the title of the purchaser is neither threatened by suit nor clearly shown to be defective.

STREETS, LOCATION OF.—Ancient reputation and possession, in respect to the location of streets, are entitled to more respect, in determining the boundaries of lots, than any experimental survey that can now be made.

BILL for an injunction. The opinion states the case.

Stevenson and Nicholas, for the appellants.

Wickham, contra.

By Court, GREEN, J. The appellee, Miller, holding as trustee for the other appellee, claimed title to part of a lot in the city of Richmond, extending on E street from the corner of a Mr. Davidson's house to that of a Mrs. Gray's house, a distance of thirty-nine feet ten inches; and bounded by the walls of those houses. Miller sold this property at public sale to the appellants, as and for thirty-nine feet ten inches, at the price of two hundred dollars per foot. He conveyed to the appellants with general warranty, and they paid two thirds of the purchase-money in two installments, but obtained an injunction to the proceedings to recover the payment of the third installment upon the ground that two feet two inches in front, of the ground conveyed to them and in their possession, belonged to Davidson, on the following case: Davidson had title to twenty-four feet on E street, commencing at the intersection of E and Twenty-

first streets; and Miller had title to thirty-nine feet ten inches on E street, running from Davidson's corner to Mrs. Gray's corner. It is alleged that Davidson's house, which is twenty-four feet on E street, encroaches on Twenty-first street, two feet two inches; and if he should be compelled to surrender these two feet two inches, as a part of the street, he will, in that case, be entitled to the same quantity out of the land sold by Miller to Ralston and another. It is not pretended that any one, authorized to act on the subject, even threatens to disturb Davidson's possession as it now is, and he himself does not now even claim any part of the land sold to the appellants, but declares that if he shall be compelled to surrender the two feet two inches, he will seek to indemnify himself to that extent out of Ralston's lot; but thinks, himself, that his house is truly located at the intersection of the streets. This court has, in favor of purchasers, gone far beyond anything which has been sanctioned by the courts of chancery in England or elsewhere, in enjoining the payment of the purchase-money, after the purchaser has taken possession under a conveyance, especially with general warranty. Yet, it has never gone so far as to interfere, unless the title was questioned by a suit, either prosecuted or threatened, or unless the purchaser could show clearly that the title was defective. How do the appellants attempt to show this latter fact in relation to this property? Mr. Young, the surveyor for the city, taking the intersection of some other streets as true, without any evidence that they are more correct than the one on which Davidson's house stands, and measuring horizontally, finds that Davidson's house encroached on Twenty-first street. If he had taken the corner of Davidson's house as at the true intersection of E and Twenty-first streets, he would have found the same error in the other streets from which he began. There is no evidence whatever that the intersection of the streets assumed by Young to be right, was so; but as to that of E and Twenty-first streets, it is probable, from the evidence of Myers, that it is where Davidson claims it to be, at the corner of his house. If the original survey of the town was erroneous, either because it was made without regard to horizontal distances, or from any other cause or accident, and the property has been sold and held according to such survey, it is too late now to correct such errors. Ancient reputation and possession in respect to the boundaries of the streets are entitled to infinitely more respect in deciding upon the boundaries of the lots, than any experimental survey

that can now be made. If not, the whole city, and all other towns, would be thrown into the utmost confusion. The only error in the decree is, that it did not dissolve the injunction wholly, and it should now be corrected in that particular. Injunction dissolved.

The other judges concurred.

CARR and CABELL, JJ., absent.

In *Taylor v. Case*, 29 Gratt. 795; *Faulkner v. Davis*, 18 Id. 661; *Peers v. Barnett*, 12 Id. 416, this decision is approvingly cited.

The principal case is considered authority also, on the point, which it decides concerning the admissibility of evidence of reputation to establish the boundaries of tracts of land wherein the people at large have an interest. The boundary of the street and of the lot in this case being the same, in order to prove the limits of the lot, hearsay evidence of the location of the street was admissible under the rules of evidence stated in the note to *Speer v. Coale*, ante, 627.

THE BANKS v. POITIAUX.

[3 RANDOLPH, 136.]

CORPORATE POWERS.—The creation of a corporation gives it, without any express grant, the power of buying and selling. This power may, however, be denied or limited by the charter or by general law.

PURCHASE BY CORPORATION OF MORE REAL PROPERTY than by its charter authorized, is not void. The corporation acquires and may at any time before dissolution convey the title.

VIOLATION OF CHARTER by a corporation can not be collaterally inquired into in a suit brought by it on its contract with the defendant.

CORPORATE SEAL is not essential to an agreement to convey real property.

BILL filed by the Bank of Virginia and the Farmers' Bank of Virginia for the specific performance of a contract with one Poitiaux, who had agreed to give his bond and a deed of trust for certain lands conveyed to him by the banks. The objections raised by the defendant are stated in the opinions. The banks appealed from the decree of the chancellor, that they had exceeded their powers in selling the land.

Nicholas and Leigh, for the appellants.

Wickham, contra.

GREEN, J. The contract in this case is distinctly proved, and has been so far executed as to entitle the appellants to a decree for its specific performance, unless the banks are unable to give to the appellee a perfect and indefeasible legal title; or unless a court of equity ought to refuse its aid to the appellants upon

the ground that the purchase and sale of the property in question was contrary to the policy of the law, as declared in the charters of the banks. The creation of a corporation gives to it, amongst other powers, as incident to its existence, and without any express grant of such powers, that of buying and selling: 10 Co. 306. This power may be limited, restrained or prohibited, either by the charter creating the corporation, or by a general law, as in England, by the statutes of mortmain; which provide that if lands be conveyed to a corporation, without license, the next lord may enter for a forfeiture; and if he do not enter within a limited time, that then the king may; but until entry, the estate continued in the corporation: 15 Vin. Abr. 491. The charters of the bank of Virginia and of the Farmers' Bank, after authorizing them to purchase, hold and enjoy lands and tenements, goods and chattels to a specified value, and sell and dispose of them, provide that the lands which it shall be lawful for them to hold, shall be only such as shall be requisite for their immediate accommodation, etc., or acquired in satisfaction of debts, etc.; and that they shall not, directly or indirectly, deal in or trade in any other thing, except bills of exchange, gold or silver bullion, etc.

It is insisted that the lands which the banks sold to the appellee were not acquired in satisfaction of debts, etc., and were not requisite for their immediate accommodation, etc., according to the charters, and that, therefore, the banks could not acquire any title to such land, and could not convey any title to the purchaser from them, or if they could, that as the purchase and sale were contrary to the policy of the law, a court of equity ought not to assist them, by enforcing the contract. It seems to me that the charters are only directory in this respect: they impose no penalty in terms. They do not declare the purchase by or conveyance to the banks to be void, nor vest the title in the commonwealth, or any other than the banks, in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer that title to any other. If, in making the purchase of the land in question, the banks violated their charters, the corporation might for that cause be dissolved by a proceeding at the suit of the commonwealth, and even in that case it seems to be the better opinion, that the property, if not previously conveyed to some other, would revert upon the dissolution of the corporation to the grantor, and not to the commonwealth: Co. Lit. 13, b. But any conveyance made by the

corporation before its dissolution would be effectual to pass their title: Fonbl. Eq. 298, note (s), and the cases there cited. The banks have, therefore, a title which they can convey to the appellee, and which would, in his hands, be indefeasible. If, in this case, the banks violated their charter, by the purchase of the land in question, the maxim, "*factum valet quod fieri non debet*," seems to apply. It would be extremely inconvenient if every contractor with one of these banks could, for the purpose of avoiding his contract, institute the inquiry whether the bank had violated its charter. They have a right to insist that the question should be tried by a jury, in a proceeding having that single object in view. In England, a tenant of lands conveyed in mortmain, cannot, in a replevin against the corporation or its bailiff, plead the fact of the conveyance in mortmain, to bar the corporation of its right to distrain: 15 Vin. Abr., "Mortmain," E.

This case does not fall within the principle of *Wilson v. Spencer*, 1 Rand. 76 [10 Am. Dec. 491]. In that case an association of individuals dealt in a manner utterly prohibited by law, and a contract founded on those unlawful dealings was declared to be void. In this case, the statutes do not prohibit the purchase of real property by the banks; but only limits the extent of such purchases, and the question whether they have or have not exceeded the limits prescribed to them, is not fit to be tried in this suit, and at the instance of this party. In that case, the judgment of the court was calculated to promote, decisively, the policy of the law which was violated. In this case, a refusal to enforce the contract would seem to counteract the policy of the law alleged to be violated, by compelling the banks unwillingly to continue to hold lands, the holding of which constitutes the alleged violation of the law; but if it were the duty of the court to inquire in this case, whether the banks had, in the purchase in question, exceeded the limits prescribed by their charters, I should say that they had not. If they had kept the ground not covered by their banking houses for gardens, they could not have been charged with a violation of their charters, and, using it in a way to secure to the banking houses against fire, was equally innocent, although they combined with that object, the other of getting a reimbursement in part of the cost of the land.

The objection that the contract was invalid, because not made under the common seals of the banks, is also unfounded. The objection was made and overruled in the *Bank of Columbia*

v. *Patterson*, 7 Cranch, 299; and in *Legrand v. Hampden Sydney College*, 5 Munf. 324; in the last of which the contract was for the sale of land.

The decree should be reversed, and the contract specifically executed.

CABELL, J. The contract stated in the bill, if not admitted by the answer, is clearly established by the proofs in the cause; and having been partly performed, it is taken out of the statute of frauds and perjuries. The appellee, however, seeks to escape from the payment of the purchase-money, on the ground that the appellants cannot make a good title to the land; and for the purpose of showing this inability on the part of the banks, he relies on that clause in their charters which declares that the lands, tenements and hereditaments, which it shall be lawful for them "to hold," shall be only such as shall be requisite for their immediate accommodation, in relation to the convenient transaction of their business. He contends that the land sold to him by the banks was not such as was requisite for their accommodation in the convenient transaction of their business, as is proved by the fact of their selling it; that the banks, therefore, could not hold the land themselves, and that, not being able to hold, they could not convey.

There is another clause in the law chartering the banks, which declares that they shall be "able and capable in law to have, purchase, receive, possess, enjoy and retain, to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects," to the amount of the sums on which they are allowed to trade; and both of these clauses must be taken into consideration in determining the rights and disabilities of the banks. Without deciding the point, let it be conceded to the appellee that it is competent to him to inquire, in this cause, whether the appellants violated their charters in the purchase of the land in controversy. For, if their purchase was lawful, it will hardly be contended that they cannot sell it and make a good title. The banks are unquestionably authorized to purchase such lands as may be requisite for their immediate accommodation in relation to the convenient transaction of their business; and it must have been intended that on this subject they should have been allowed to exercise a reasonable discretion. In determining what their convenient accommodation may require, it would surely be very proper to look to those circumstances which may be necessary to guard against losses or destruction by fire, and to regulate their purchases

accordingly. It is impossible to read the evidence in this cause, and not to perceive that this was the great object of the banks.

The whole joint purchase embraced only one acre, a quantity which, it is believed, no person would contend was too great, provided they had permitted that portion of it to remain vacant and unimproved which was not covered by the bank building. The banks, however, thought that their great and lawful object, security from fire, would be sufficiently, if not better promoted, by occupying the whole space with fire-proof buildings; and having thus accomplished their object, they then sold out such as were no longer necessary to be held by them. The object for which the purchase was made, rendered the purchase legal; and it would be a most mistaken idea to suppose that a purchase lawfully made ceases to be legal, or that the banks cease to have a right to hold or to convey lands lawfully acquired, merely because the object which induced the purchase has been accomplished, or no longer affords an inducement to hold it. If this were the case, the consequence would be that the banks could not change the site for carrying on their business by acquiring new houses or lands for that purpose, however convenient and even necessary the change might be, without forfeiting their right to the lands and houses which they now lawfully hold. An argument leading to such consequences can not be sound; and yet this is, in truth, the only argument on which the pretensions of the appellee are founded.

I am of opinion that the decree be reversed, and the cause remanded to be further proceeded in.

BROOKE, PRESIDENT. If the contract in this case had been entered into by natural persons only, there could be no doubt on the facts in the record that a part performance is so proved as to take it out of the statute of frauds and perjuries. Possession and improvements have always been held to take the contract out of the statute. The objection that the charters of the two banks do not authorize them to make a joint contract, seems to be without reason. Though there is nothing in the charters to authorize them to make a joint contract, I can not perceive that a joint contract in behalf of two or more separate and distinct corporations to attain an object which severally they might attain in virtue of their charters, can be considered an infraction of them because not expressly provided for therein. The same ends are to be obtained as by several contracts, and there is nothing in a joint contract that is either forbidden by the charters or against their policy.

The question whether the appellants were authorized to purchase the lot in controversy, under the restrictions in the charter, which prohibits them to purchase lands to a greater amount than the given sum stated in each charter, including their capital, is not made, I think, by the pleadings; and if made, could not be examinable in this case. It would be difficult to ascertain whether the excess in the purchase would fall on the lot in question, or on other property held by the appellants; and if it would, a sentence of forfeiture could not be pronounced in this cause. Such sentence could only be pronounced upon a writ of *quo warranto*, or some other proceeding in behalf of the commonwealth; and, in that case, the lot having been sold before the emanation of the process, the title would pass to the vendee: 1 Fonbl. 298, and the cases cited in note (s). But if the excess in the purchase would be fixed on the lot in question in this suit, the eighth sections in the two charters seem to imply that it might be sold by the appellants. The words are, "the lands, tenements and hereditaments, which it shall be lawful for the corporation to hold, shall be only such as shall be requisite for its immediate accommodation, in relation to the convenient transacting of its business." The denial of the right to hold more lands, etc., than for the purposes recited in the act, does not limit the right to purchase more, if within the amount prescribed by the previous section, and seems to admit the right to sell, whenever any of the purposes for which they are authorized to hold, no longer exists.

As to the manner in which the contract was made, it not being under the seals of the corporations, that objection was overruled in the case of *Hampden Sydney College v. Legrand*, 5 Munf. 324, and the *Bank of Columbia v. Patterson's admr.*, 7 Cranch, 299. I think, therefore, that the decree must be reversed, and such decree entered as has been agreed upon by the court. The decree is, that the said decree is erroneous; therefore it is decreed and ordered that the same be reversed and annulled, and that the appellees pay to the appellants their costs, etc., and that the cause be remanded to the superior court of chancery for further proceedings, in which an account is to be taken for the purpose of ascertaining what sums of principal and interest are due from the appellee to the appellants upon the contract and loan in the proceedings mentioned, and that the said contract may be specifically executed under the direction of the said court of chancery.

CARR and COALTER, JJ., absent

WISELEY v. FINDLAY.

[3 RANDOLPH, 361.]

PARTITION IN EQUITY is a matter of right, and not of discretion, in all cases where the complainant is entitled to partition at law, and can show a clear legal title.

A CONVEYANCE in which the grantors recite that the property is subject to a life-estate, when in fact it is subject to an estate for years only, is good as a transfer of the entire estates of the grantors in the property.

DOWER.—A widow can not be barred of her dower by a devise of an estate for years, nor by a provision in personal estate.

PETITION for partition. James Findlay died, leaving a widow, Mary, and nine children, two of whom were married women. By his will he devised to Mary "the plantation I now live on, and all movable property," as long as she lived, or until his youngest child came to age. Wiseley purchased of four of the sons "all their right, title, interest or claims" in and to the tract of land in question, and the deeds proceed to say: "and which he has devised to his wife during her life." Wiseley afterwards bought the interest of the two married daughters, and in their deeds, the estate of the wife is described to be "during her life, or until his youngest son comes of age."

Wiseley's petition set forth that the youngest child had come of age, and prayed partition and "an accounting. The widow and the children answered that the widow had a life-estate.

The chancellor dismissed the bill as to the widow, and appointed commissioners to divide the land into nine parts of equal value, and report. The complainant appealed.

Wickham, for the appellant.

Johnson, *contra*.

CARR, J. The plaintiff's cause has a bad aspect. I am very much inclined to believe that he has purchased from the children of Findlay their interests in the land under the idea that the old lady had a life-estate, when he knew that she had not; and is now availing himself of his legal title to turn her out, and thus break up the family understanding and arrangement. Having this impression of the plaintiff's conduct, I have examined this case with every disposition to find some ground on which I could feel authorized to defeat his object; and I thought I had found it in the discretion which equity exercises on many occasions. It struck me during the argument that this was of that class of cases where the application is to the sound discre-

tion of the court, and not *ex debito justitiæ*; especially as there was a writ of partition under the statute.

The first authority I found seemed to encourage this idea. It is the case of *Cartwright v. Pullney*, 2 Atk. 380, where Lord Hardwicke says: "Where a bill is brought for partition, a party must show himself entitled; and this is stricter than at law, where seisin is sufficient. Here the reason is because conveyances are directed, and not a partition only, which makes it discretionary in this court whether, where a plaintiff has a legal title, they will grant partition or not; and where there are suspicious circumstances in the plaintiff's title, the court will leave him to law." This looked very much like placing the subject on the ground of specific execution. But on looking more deeply into the subject, I find that the law is differently settled by many cases. There is no act of parliament in England, or statute in this country, which gives equity jurisdiction in this case. It has been assumed in partition, as well as in dower, from the extreme inconvenience and difficulty of proceeding at law: *Agar v. Fairfax*, 17 Ves. 551. In exercising this jurisdiction, the courts have considered themselves bound by the principles which govern cases of partition at law; and, accordingly, wherever a party shows a legal title they consider him entitled as of right to a partition. In *Parker v. Gerard*, Amb. 236, Sir Thomas Clark held that a bill for a partition was matter of right; and though the interest of one party was so inconsiderable that he would rather have given it up than incur the expense of the suit, he was compelled to make partition and pay an equal share of the costs. The master of the rolls laments the injustice the court is frequently obliged to commit, having no discretion on the subject.

In *Turner v. Morgan*, 8 Ves. 143, the bill was for partition of a house. Lord Eldon considering that it would be very injurious to the party defendant, who owned a third of the house, proposed a compromise. But when that failed, he said: "It cannot be denied that a partition is due now under the statute to divide this species of inheritance, and I know no rule but by considering a commission as due in a case where the writ would lie." In *Baring v. Nash*, 1 Ves. & B. 551, the vice-chancellor, speaking of the right which the part owner of an estate, however minute his interest, would have to compel a partition at law, says: "Then how does it stand upon principle? Courts of equity have a concurrent jurisdiction with courts of law, upon partition, more convenient where the interest is much divided.

With that concurrent jurisdiction, is a court of equity to adopt the principle which prevails at law, or to act upon a different principle?" After some further observations, he repeats the remark of Lord Eldon, in *Turner v. Morgan*, that he knew of no rule but to grant a commission where the writ would lie; and adds: "Certainly referring to the rule of law by analogy to which the conduct of a court of equity should be regulated, these authorities establishing the principle that a rule of this kind, involving the right of an individual, should be the same in both courts; and therefore, a tenant for years, if he would be entitled to partition at law, ought to have it in equity."

He then proceeds thus: "The only authority that appears to consider the bill for partition as matter not of right but of discretion, is a passage in *Cartwright v. Pultney*," the case I first quoted. After repeating Lord Hardwicke's remark, he says; "This must be taken with the context. It is stated to be discretionary where there are suspicious circumstances in the plaintiff's title, as in that case, a suspicion of forgery. Where the legal title is under such suspicious circumstances, a court of equity may well pause in directing partition. But if the title is clear, a partition is matter of right; and it is expressly stated in *Parker v. Gerard*, that there is no instance of not succeeding in such a bill, but where there is not proof of title in the plaintiff; and in the case of *Lord Bath*, the court gave leave and time for the plaintiff to make out his title." These authorities compel me to consider it settled law that where a plaintiff comes into equity for petition, showing a clear legal title, it is matter of right, and not of discretion.

Let us inquire, then, into the plaintiff's legal title. The deeds made by the four sons state that they had sold to the plaintiff, for the sum of three hundred dollars each, all their right, title, interest and claim in and to a certain tract of land lying in the county of Wythe, adjoining the lands of D. Wiseley, containing two hundred and fifteen acres, being the same tract on which their father lived at the time of his death, and which he devised to his wife during her life. The two deeds from the married daughters and their husbands differ both in the words of conveyance and of description. They are more formal in the first and more exact in the last. There can be no question about them. As to the deeds of the sons, though defective in the formal words of conveyance, I presume they are sufficient, as they clearly express that the bargainors had sold all their interest for a valuable consideration, and this was sufficient at com-

mon law to raise a use. But do these deeds sufficiently describe the land? It is two hundred and fifteen acres, lying in Wythe county, adjoining the lands of the plaintiff, being the same tract on which their father lived at the time of his death; and if the description had stopped here there can be little doubt, I presume, that it would have been sufficient so to designate the land, as to have made the deeds valid. But in further description, they add: "and which he devised to his wife during life;" and when we come to inspect the will, we find that no land was devised to her for life; but this same tract to her for years only. This, however, cannot, I think, render that bad which was good without it, as *utile per inutile non viliatur*. It seems to me, therefore, that the deeds convey to the plaintiff the legal title. The argument that this recital in the deed showed the understanding of the parties as to the interest they were selling may be very true and might be very important upon a bill filed to set aside these deeds for fraud or mistake. But when we are upon the legal title purely, I do not think it a consideration of weight; for the deeds certainly, if they operate at all, convey all the right, title and interest of the bargainors, whatever that may be.

With respect to the statute against buying and selling pretended titles I do not think it has any application. The widow was in under the will; claiming no other estate than it gave, though mistaking that for a larger interest than it really was. Her title was not adversary to that of the sons. She had entered lawfully, held lawfully, and had done nothing which even the other party could have elected to consider a disseisin. The sons, then, had a right to sell, the plaintiff to buy, and the deeds passed their interest.

As to the deed of the youngest son being made after the institution of the suit, I see nothing in it. The plaintiff had already a right, under the other deeds, to come for partition. As to the hardship of turning the widow out in her old age, though I disapprove of the conduct of the plaintiff, and generally of those who thus intrude themselves into these family matters; yet I can not think the widow has been or will be so hardly dealt by as the counsel seem to think. She has had the whole land for twenty-four years without rent. She still holds the whole; and can not be turned out till her fair dower is assigned her, to which she has an unquestionable claim.

GREEN, J. The will of James Findlay gave to his wife an estate for years only in the land in question, determinable by her death, before the youngest child attained his age of twenty-

one years. The freehold and inheritance descended upon the children who were seised, and the widow's holding over after the youngest child attained his full age, did not give her a possession adversary to them, or disseise them, especially if she held over with their assent, as seems to be the fact. Entering by title under the will, she could not, after the expiration of her term, hold adversely to the reversioners, without doing some act which amounted to a disseisin, as by conveying to another. She has done no such act; but on the contrary, in her answer she claims only under the will a larger estate indeed than she is entitled to, but still under the will. Such a claim can not disseise the reversioners, or give her a possession adversary to them. The children might, therefore, effectually convey their interest in the land by deeds of bargain and sale.

The conveyances made by Glass and wife, and Henderson and wife, were made some time after the deeds were made by the four sons of James Findlay. Those deeds state the devise to Mrs. Findlay truly, and convey all the right, title and interest of the grantors in the land, to the appellant. No question can be raised upon the terms of those deeds, whether they passed the whole interest of the grantors or not. The conveyances from the four sons (one of which was made after the youngest child of James Findlay came of age), state that the grantors have sold all their right, title and interest, in the land, to the appellant; but in describing the land they use the expression, "which he (James Findlay), has devised to his wife during her life." The land, however, is otherwise sufficiently specified by describing it as that on which James Findlay lived at the time of his death. These deeds also convey to the appellant all the interest of the grantors in the land. The operative words of the deeds are, that they had sold all their right, title and interest, in and to the land whereon James Findlay lived at the time of his death. The mistake in the further description of the land, or of the estate held by James Findlay's wife in the land, can not impair this operation of the deed. Thus, in the *Earl of Clanrickard v. Lisle*, Hob. 273, husband and wife, entitled in right of the wife, to a reversion in fee, recite in the deed that the wife had title of dower in the land, and grant all their estate in the said third part of the land. It was determined that a third part of the reversion in fee passed by the deed. This case is stronger than the case at bar. So in *Bartlett v. Wright*, Cro. Eliz. 299, A. granted to B. all his house and two yard lands in C. in the possession of D.

Two acres were not in the possession of D., but all the rest were. It was adjudged that the two acres, not in the possession of D., passed by the deed. In the first of these cases, the general words of the grant, all their estate, had their full effect, notwithstanding this mistake in the description of that estate, as being smaller than it really was; and in the other, the whole of the land passed by the words, "all his house and two yard lands in C.," notwithstanding the mistake in describing it as in the possession of D.

The plaintiff, having a perfect legal title to a part of the land, filed his bill for a partition; and it is insisted that he is not entitled to it in a court of equity, because he has been guilty of a fraud upon the children, who have conveyed their interests to him, in procuring the conveyances, such as they are, from them, acting under the mistaken belief that their mother had a life-estate in the land, and only intending to sell their reversion, subject to this life-estate. In respect to the conveyances by the four sons, it appears to me that they and the purchaser acted under a mutually mistaken opinion as to the extent of Mrs. Findlay's estate in the land; and that they thought they were selling, and he that he was purchasing, the land, subject to an estate in her for life, and this was the interest he paid for. It seems to me that in justice the proportions of these children in the land ought to belong to them, not to their mother during her life. But this is a question not fit to be decided in this case, for reasons which will be hereafter stated.

Wiseley seems to have been informed of the true effect of Findlay's will, after he took the deeds of the sons, and before he took deeds from the daughters of Findlay; and accordingly varied the phraseology of the deeds from the latter so as to conform truly to the terms of the will. But he seems to have encouraged the opinion on the part of the grantors that Mrs. Findlay had a life-estate, whilst he procured from them deeds which passed an immediate interest. In relation to these, too, I should doubt whether, in justice, the grantors ought not to enjoy the lands during the life-time of Mrs. Findlay, if this were a proper occasion for deciding that question. I observe, however, that the husband of one of these daughters admits that he made no reservation. An application to a court of equity for partition does not seem to be an application to the sound discretion of the court, to be granted or refused according to the circumstances of the case, as in cases of specific performance, and other cases, but to be due *ex debito justitiæ*. It

is a remedy substituted for the difficult and perplexed remedy by writ of partition. I doubt whether a writ of partition has ever been prosecuted in Virginia. Indeed, the form of the writ has never been devised in the general court, as the statute authorizing the writ directs. The only indispensable requisite to entitle the plaintiff to relief in such case is, that he shall show a clear legal title. If his title be disputed or doubtful (as if there be a question whether the deeds under which he claims are forged, or if his title depends on difficult and doubtful questions of law, which are emphatically proper for a court of law), the decree for partition is suspended until he establishes his title at law, not in a writ of partition, but by ejectment or other legal remedy. And if in such proceeding he establishes the genuineness of his title papers, or the questions of law on which his title depends, are decided in his favor, he returns to the court of equity, and partition is decreed according to his established rights.

These propositions are sustained by the cases cited in *Wilkin v. Wilkin*, 1 Johns. Ch. Cas. 111, and in *Philips v. Green*, 3 Id. 302. To what end, in this case, should Wiseley be sent to law? It would only involve the parties in costs. There he must inevitably recover the portion of the land to which he has a legal title, and the rents and profits, unless the widow had a right to the possession until her dower was assigned; an undivided portion to be sure, which he might occupy and enjoy after the assignment of dower, if the widow be entitled to dower, in common with the others entitled. This would be a state of things beneficial to none of the parties concerned. What is opposed to the appellant's application for a partition? Not any right vested in the widow, who is in possession of the whole of the land; but an equitable claim on the part of some of the children, not in possession, to the temporary enjoyment of the land; and this is not clear or admitted, but depending upon an alleged mistake in making the conveyances or fraud of the appellant. A refusal to decree partition is a decision in favor of the widow, who has no right in consequence of an alleged right in others, a decision in no way beneficial to those who claim this right. They have no right at law, and cannot there recover the possession by any proceeding. If they have any right, it can only be asserted in a court of equity by a bill impeaching the conveyances, upon the ground of mistake or fraud. A partition will present no impediment to this remedy. So that a refusal to decree a partition cannot benefit those who claim an

equitable right against the appellant; nor will a decree for partition prejudice their rights. A partition is asked against the widow and children who have not conveyed their rights. They have no rights or equity adverse to the rights of the plaintiff. Even the maxim that he who asks equity must do equity, if it were applicable to such a case as this, extends only to doing equity to the same person of whom it is asked, and not to persons against whom nothing is claimed or asked: Francis' Maxims, Max. 1. The plaintiff was, therefore, entitled to a decree for partition.

It is no objection that he acquired the legal title of two of the heirs, subsequent to the institution of the suit. He had before the suit was instituted acquired the legal rights of four of the heirs, which is sufficient to support his bill. If he had not acquired the rights of the other two, their portions would have been assigned to them. Having acquired their rights, *pendente lite*, their portions should now be assigned to them. But the widow is entitled to dower in the land. The devise to her of the whole land for years, even if it had been expressly declared in the will to be in lieu of her dower, would not, although she took the land under the will, have been such a jointure as could bar her right of dower under the eleventh section of the act of 1792, c. 94. Nor can any provision made by her husband's will in personal estate, accepted by her, bar a widow of dower in his real estate. The act of 1792, c. 92, sec. 25, which declares that unless the widow shall renounce the provision made for her by her husband's will, she shall have no more of his slaves and personal estate than is given her by the will, is confined in express terms to personal property; and this was decided in *Blount v. Gee*, cited by Judge Tucker in *Ambler v. Norton*, 4 Hen. & M. 23. Nor is the widow liable to account for the rents and profits of the lands. This appears to be a plantation belonging to the mansion-house of her husband; and under the act of 1792, c. 94, sec. 2, she is entitled to occupy it without responsibility for rent, until dower is assigned her.

The court below ought to have pronounced a decree, assigning dower to the widow, and a partition subject to her right of dower.

COALTER and CABELL, JJ., concurred in the following, which was entered as the decree of the court:

The court is of opinion that the defendant, Mary Findlay, the

widow of James Findlay, was entitled, under the will of her husband, to the tract of land in question, only until his youngest child attained the age of twenty-one years; and that she is entitled to dower of the said lands, and to occupy the same without being liable for the rents thereof, until her dower be assigned to her. And the court is further of opinion, that the appellant was entitled to a partition, subject to the widow's right of dower, and that the court below ought to have pronounced a decree assigning dower to the said Mary in the said land, and for making a partition thereof, according to the rights of the respective parties, and letting them into possession of their respective portions, to be held in severalty, subject to the widow's dower. Therefore the decree is to be reversed, so far as it conflicts with this opinion, with costs, and the cause remanded to be further proceeded in, according to the principles of this decree. But this decree is not to prejudice any of the parties, in any suit that they may be advised to bring against the said Wiseley upon the ground of fraud or mistake, in relation to the terms of the conveyances made to him.

BROOKE, President, absent.

THE PRINCIPAL CASE is examined in *Dixon v. McCue*, 14 Gratt. 540, 552, and the following criticism made by Judge Daniel in regard to the point concerning the bar of a widow's dower: "The case of *Wiseley v. Findlay*, 3 Band. 361, is cited in the petition for the appeal as authority for the propositions, that a devise by a husband to his wife of his whole lands for years, even if expressly declared in the will to be in lieu of dower, would not, though she took the lands under the will, be such a jointure as could bar her right of dower. And that no provision made for her in her husband's will in personal estate, though accepted, can bar a widow of her dower in his real estate. On a reference to the case it will be seen that no such propositions were decided by the court; though it is true that dicta to that effect were made by Judge Green in the course of his opinion. Judge Tucker, in vol. 1 of his Commentaries, at pages 74, 75, remarks at some length on the case of *Wiseley v. Findlay*, and at page 75 he says: 'It is very certain that in that case, the provision being by will, it was no absolute bar if the wife should renounce it, which she might have done, notwithstanding more than a year had elapsed from her husband's death, as the act requiring such prompt renunciation did not apply to her dower right. Still we are not precluded, I presume, by the opinion of the court in that case, from giving to the act a construction which would make even personalty a bar to dower, when properly settled by way of jointure. Thus if before marriage a woman of full age enters into articles with her intended husband by which ten thousand dollars in stock are settled upon her in lieu of dower, I should have no doubt it would operate an absolute bar under the broad terms of our act, unless indeed they shall be narrowed down by judicial legislation: See *Ambler v. Norton*, 4 Hen. & M. 23. And so though a devise of ten thousand dollars, either expressly or by averment, in lieu of dower, is no absolute bar, since the wife

is not bound by the will of her husband, yet it will so far operate as a joint-ure under the act, that she will be compelled to make her election and relinquish either the dower or the bequest.'” The court quoted further from Tucker’s Commentaries upon the proposition, and said: “The question in such cases, whether the wife shall be put to her election, does not turn on the character of the estate, as whether real or personal, in which the provision is made for her. The true inquiries are: Is it manifest that the provision was intended to be in lieu of dower; or, is it clear that the claim of dower conflicts with the devise to another of the subject in which the dower is claimed?”

In regard to barring a widow’s dower by a devise or legacy, see *Evans v. Webb*, 1 Am. Dec. 308, and note; *Hamilton v. Buckwaller*, Id. 350, and note; *Larrabee v. Van Alstyne*, 3 Id. 333; *Van Orden v. Van Orden*, 6 Id. 314; *Adsit v. Adsit*, 7 Id. 539, and note.

THOMPSON v. JACKSON.

[3 RANDOLPH, 504.]

RESCINDING CONTRACTS.—Equity will not rescind every contract of which it would refuse a decree of specific performance.

TO RESCIND AN EXECUTED CONTRACT, in equity, fraud or mistake must appear; mere failure of consideration, arising from the sale of a defective title, unmingled with fraud or *mala fides*, is not sufficient.

MISTAKE AS TO THE NUMBER OF ACRES OF LAND PURCHASED, where the purchaser obtains the substance of what he expected, will not justify a court of equity in rescinding the contract.

APPEAL. The opinion states the case.

Daniel, for the appellant.

Leigh, *contra*.

CARR, J. Lucy White, residing in the county of Louisa, directed by will, that her executor, Jackson, should sell her land lying in Hanover, and divide the money in certain portions among certain legatees. The executor, wholly unacquainted with the land, employed Street to survey it. He did so, and made out a plat, showing a tract of two hundred and seventy-eight acres. By this survey the land was sold at public auction, and bought by the plaintiff. The contract was executed by the delivery of a deed to the purchaser and his giving a deed of trust on the land, which also included some slaves, and executing his bond for the purchase-money. After this he discovered that one Wright claimed title to a part of the land included in his deed; which is considered by the witnesses to amount to one fourth in value of the whole tract. Upon this he proposed to rescind the contract. The executor refused,

but offered to survey the land and abate for any deficiency which might be found to exist. This proposition was not acceded to. The time of payment came round. The trustee advertised to sell under the deed of trust; and the plaintiff filed this bill to stay the sale, and to rescind the contract. The chancellor dissolved the injunction, except as to five hundred dollars, and the plaintiff appealed.

The first question is, ought this contract to be rescinded. In the argument for the appellant it was contended that there was no difference, in reason and principle, between an application for specific execution and an application to rescind. Many cases were cited to prove that in a case like this equity would refuse a specific performance; and hence the conclusion was pressed upon the court that we ought to rescind the contract. I had thought it well settled law that the two cases were separated by a broad and strong line of distinction. Executory contracts for real property, and some other subjects, offer to the party the alternative of either suing at law for damages or asking the aid of equity to obtain the specific thing. The application to equity is not *ex debito*, but merely presents to the sound discretion of that forum this question: Is it better for the furtherance of justice, considering all the circumstances of the case, to give the party a specific execution, or to leave him to his legal remedy? Very different is the question where a party asks the court to rescind a contract, especially an executed contract. In the first case the court merely decides which of two remedies a party shall pursue. In the second, it annihilates a solemn contract, rendered still more imposing by the fact that the parties have carried it into execution; thereby changing materially their situations, and giving birth to new rights and obligations.

The vendor has parted with the title and possession of his land, and has taken his money, bonds or other equivalent. The vendee has entered into possession, clothed with the fee or other estate purchased; and for security of his title, has taken a deed with such covenants and warranty as his contract called for. To undo all this is a strong handed measure, and none but a clear and strong case will justify it. Accordingly we find it laid down, in all the equity books, that the court is in the daily habit of refusing the specific execution of contracts, which at the same time it just as promptly refuses to rescind. Thus, in *Mortlock v. Buller*, 10 Ves. 306, Lord Eldon says: "It is much too late to discuss now, whether this court ought to order a

contract, that it would not specifically perform, to be delivered up, and to decree the performance of a contract, which it would not order to be delivered up; for the distinction is always laid down that there are many cases in which the party has obtained a right to sue at law, and under such circumstances, that his conscience cannot be affected here, so as to deprive him of that remedy; and yet, on the other hand, the court, declaring that he ought to be permitted to sue at law, will not actively interpose to aid him, and specifically perform the contract."

The cases are numerous in which we see bill and cross-bill, the one for specific execution, the other to have the agreement delivered up to be canceled, and both dismissed. Many of the following authorities are of that kind, and all of them state the settled distinction between the two cases: *Underwood v. Hitchcox*, 1 Ves. 279; *Barnardiston v. Lingood*, 2 Atk. 133; *Twining v. Morrice et al.*, 2 Bro. Ch. Cas. 326; *Day v. Newman*, 2 Cox's Ch. 77; *Tilly v. Peers*, cited in *Mortlock v. Buller*, *ubi supra*; *Mason v. Armitage*, 13 Ves. 25; *Clifford v. Brooke*, Id. 131; see, also, 14 Ves. 413; 16 Id. 87; 17 Id. 167; 18 Id. 335. After decisions so numerous and so uniform, the point must surely be considered at rest. When the application is to rescind an executed contract for land, the English books lay it down as a general rule, admitting of but few exceptions, that to justify such decree fraud must appear; and this fraud must be distinctly put in issue by the pleadings. If the charge be a mere failure of consideration, arising from the sale of a defective legal title, unmingled with fraud, or *mala fides* of any kind, it is generally laid down, that the vendee will be left to the covenants and warranty in his deed: See 1 Fonb. 374 (n); Co. Lit. 384, Butler's note; 4 Cruise, 90; Sugd. 314, 315, 316, 317, and the cases cited; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Abbott v. Allen*, 2 Id. 519 [7 Am. Dec. 554]; *Gouverneur v. Elmendorf*, 5 Id. 84; *Edwards v. McClay*, Coop. Eq. 307.

To this general rule there are some exceptions of cases which may be classed under the head of mistake; but the mistake must be plain and palpable, and must affect the very substance of the subject-matter of the contract. As where the executor of a mortgagee assigned the mortgage to the heir upon the mistaken idea that the latter was entitled to it: *Turner v. Turner*, 2 Ch. 81. So if there is an agreement for the purchase of an estate, and the purchase-money has been paid, if it turns out that the estate was the vendee's, the court will order the purchase-money to be refunded: *Bingham v. Bingham*, 1 Ves. 126.

This doctrine has been also laid down in our own reports: *Armstrong v. Hickman*, 6 Munf. 287; *Tucker v. Cocke*, 2 Rand. 51. In the case before us, the first ground of relief is out of the question. There being no fraud or misrepresentation, no suppression of truth or suggestion of falsehood charged in the bill, any evidence taken as to those points would have been irrelevant to the issue; and however strong a case of fraud it might have shown, ought not to have influenced the court at all, but to have been suppressed as improperly taken. If this were not so, the pleadings, instead of being a shield to protect parties from surprise, would be a snare to entrap them. But in truth, there is not a tittle of evidence in the record to raise even the suspicion of fraud; on the contrary, it clearly proves the *bona fides* of the whole transaction.

How stands the case on the ground of mistake? The vendee has bought a tract of land of two hundred and seventy-eight acres. It seems that in making the survey, the surveyor ran in upon one of Wright's lines so as to take from him a small slip of land, not more, I believe, than eight acres, leaving the purchaser about two hundred and seventy instead of the two hundred and seventy-eight acres he supposed he had bought. I fix the number of acres lost at about eight, because that is more than the surveyor thinks it, and I take him to be a much better judge of this matter than those who were induced, either by their occupations or their interests, to take particular notice of the land and speak loosely of its being eight, ten, fifteen or twenty acres. We all know how little weight such opinions are entitled to when accuracy is in question. But take the land lost at the largest estimate, and say it was worth a fourth of the whole purchase-money (which is contradicted by the surveyor, and can not, I think, be the fact), yet can it be said that it furnishes one of those cases of mistake which would authorize the rescission of the whole contract? Has not the purchaser gotten the substance of the thing bought? The surveyor says that this slip has no peculiar value; it is maiden woodland, and there is a sufficiency of timber for the place without it. If you say that for such a deficiency as this, not affecting the bulk of the land, you will rescind, where will you stop? I have shown that equity will refuse a specific execution in many cases where it would not rescind, and yet there are decisions in abundance to show that a trifling deficiency of a few acres in a tract of land will not even present an obstacle to a specific execution, the court saying that such deficiency lies clearly in compensation,

and that the party is made whole by abating so much from the purchase-money as is an equivalent for it: See 10 Ves. 306, and 14 Id. 413; and many other cases might be cited. I am clear, therefore, that the chancellor was right in refusing to rescind this contract.

It is said, however, that he ought not to have dissolved the injunction for any part of the purchase-money till there had been a survey. None of the witnesses make the loss amount to more than a fourth of the whole price. I can not think it will be found to amount to anything like that sum; but if it should, the chancellor has kept five hundred dollars, about a fourth of the purchase-money, tied up, to await further investigation. This, I think, was as far as he ought to have gone, and much more like equity, than to have tied up the whole, and left the purchaser in the enjoyment of both funds during the whole contest. It was contended, that on the principles of *Lane v. Tidball*, Gilm. Va. 130, the chancellor should not have permitted the trustee to proceed to a sale of the land, before the question of interference was decided by a survey; but I do not think that case applies. There, the cloud was upon the title, and there were no means of removing it but by tedious and complicated suits. Here there is no embarrassment of title; it is a mere question of interference of boundaries, depending on a single, and known, and undisputed line, between the land sold and Wright's, as to which the surveyor could only have erred by not having Wright's survey before him, and which can be corrected in an hour, and the whole matter settled. To this end, the chancellor ordered a survey, and the vendee may either have it made any day before the sale under the deed, which must be advertised four weeks, or he may prevent a sale, by the payment of the money.

I think it a clear case for affirming the decree.

COALTER, J. The witnesses in this case, though differing considerably in opinion as to the quantity of land covered by Wright's elder deed, concur in the opinion that its value is one fourth of the whole purchase. One witness estimates the quantity at ten or twelve acres, one at twelve or fifteen, and the other at fifteen or twenty. Yet, without giving any other reason than that it is maiden land, they all concur in estimating the injury to the purchaser by the loss of it, as above. If there was any peculiar value in this land, either intrinsically or relatively, as a part of the tract purchased, and that, in consequence thereof, the loss could affect it to that extent, and ought, therefore, to be con-

sidered as the substance of the thing contracted for, or even a great object in that contract, it ought to have been proved.

Without, therefore, considering the general doctrines of the law, on the subject of the rescission of contracts (which I have not had time to investigate to my satisfaction), I am satisfied that in this case there is nothing to justify the rescission of this contract, and, therefore, concur in the opinion that this furnishes no ground to reverse the decree.

I am also of opinion, that as the land of Wright, where it interferes with that of the appellant, is bounded by a natural boundary, to wit, branches, etc., and which could be shown to purchasers under the deed of trust, even if no survey could be made before the day of sale, and as no dispute seems to exist either as to Wright's title or its boundaries, I can not perceive such necessity for a survey previous to the dissolution of the injunction, as would justify a reversal of the decree. I concur, therefore, in its affirmance.

GREEN and CABELL, JJ., concurred, and the decree was affirmed.

The PRESIDENT absent.

COALTER v. HUNTER.

[A RANDOLPH, 58.]

RIGHT IN WATER-COURSE—A land owner has a right to the uninterrupted flow of the water in streams on his land unless some adjacent proprietor has acquired an adverse right to divert the same.

A RIGHT TO DIVERT A STREAM, running through another's land, may be acquired by adverse enjoyment for twenty years.

MERE LICENSE TO DIVERT A STREAM, or a loan of the use of it, can not be ripened into a right by lapse of time

EQUITY MAY PREVENT A THREATENED INJURY, such as the obstruction of one's right to the flow of water in a stream, but after the wrong is done the remedy is at law by way of damages.

POWER TO CONDEMN LAND FOR A TAIL-RACE is not given by statute.

ORDER ESTABLISHING A MILL, under the statute, must be certain.

APPEAL from the Staunton chancery court. The case was: Hunter, with whom Crawford, and Samuel and James Black were joined as co-plaintiffs, filed a bill to enjoin Coalter, the defendant, from removing certain obstructions whereby the water in Coles run was diverted so as to run through land now owned by Hunter. It appeared from the pleadings and evidence that more than twenty years before the suit, the Messrs. Black,

now complainants, who owned a saw-mill on the south fork of the Shenandoah river, obtained permission, by way of a loan, from Crawford, ancestor of the present complainant of that name, who owned the land immediately above, and from one Frame, whose land the defendant now owned, to divert a stream called Coles run and bring it into the water-course upon which said mill was located. The diversion was accordingly made, and the water of Coles run had continued uninterruptedly for twenty years to flow in the new channel with the stream with which it was joined. Hunter, the complainant, had purchased a tract of land on this stream thus united, on which there was a saw-mill, erected after the junction of the streams, which mill Hunter continued and was about to erect a grist-mill on the same land. Coalter, having purchased Frame's land, through which ran the ancient channel of Coles run, and intending to build a saw-mill thereon, entered upon the land of Crawford, as the bill charged, without permission, and removed the obstructions formerly placed in the old channel and thus caused the water of Coles run to return to said channel, so that Hunter's saw-mill was stopped for want of water. The bill further charged that as often as the obstructions were replaced the defendant again removed them. It was averred, also, that Hunter's chief inducement to purchase the land now owned by him was the saw-mill erected thereon, and that at the time of the purchase, although he had lived many years in the neighborhood, he knew of no claim of any one to divert any part of the water flowing to said mill; and further, that Frame, the defendant's grantor, had consented to the union of said streams and had acquiesced in it for twenty years. The remaining facts are stated in the opinion. The injunction was granted and, after the hearing, was made perpetual, and the defendant appealed.

Another case between Hunter and Coalter, with reference to the same matter, was heard, together with this appeal. In that case, Hunter appealed from a decision of the superior court of law of Rockingham county, reversing a decision of the county court in the matter of the application of Hunter for leave to erect the grist-mill mentioned in the previous case. The county court granted the application, upon the inquisition of a jury under a writ of *ad quod damnum*. The inquisition stated in substance that no dam would be necessary, that the head-race would be wholly on Hunter's land and that of Samuel Black, who had agreed to take twenty dollars in full compensation, which Hunter had paid; that the tail-race of said mill

would have to pass over part of Coalter's land, along one of three routes therein mentioned, the damages to said Coalter varying according to the route taken, and being respectively assessed at twenty-seven dollars, two hundred and thirty dollars, and one thousand dollars; and that in case the last-mentioned route should be chosen, the health of the neighbors might be injuriously affected.

Leigh and Johnson, for Coalter, contended, as to the first case, that to give a right to the diversion of a water-course by lapse of time, the possession and enjoyment must be adverse, and not merely permissive, citing *Eldridge v. Knott*, Cowp. 214; *Mayor of Hull v. Horner*, Id. 108; *Holcroft v. Heel*, 1 Bos. & P. 400; *Campbell v. Wilson*, 3 East, 294; 2 Wms. Saund. 175, note 2; and as to the second case, that the law gave no power to condemn land except for an abutment, and, also, that the inquisition was bad for uncertainty.

Robertson, Attorney-general, for Hunter, insisted, as to the first case, that the enjoyment of the use of the water by the plaintiff and his grantors for twenty years should be deemed adverse, and that a grant should, therefore, be presumed, citing *Bealey v. Shaw*, 6 East, 208; 1 Phil. Ev. 128; *Denn v. Barnard*, Cowp. 595; *Elmendorf v. Tylor*, 10 Wheat. 153; and, further, that Hunter, having purchased without notice of Coalter's latent claim, could not be prejudiced thereby, citing Sugd. 6, 512; *Newman v. Chapman*, 2 Rand. 93 [14 Am. Dec. 766]. As to the second case, he contended that the power to condemn land for a tail-race, though not expressly conferred by the act, was given by implication, since it was necessary to the exercise of the power which was granted, citing 1 Saund. 323, n. 6; *Horton v. Frearson*, 8 T. R. 50.

By Court, CABELL, J. In the first of these cases, Hunter claims the right to the diversion and use of the water of Coles run, and founds his claim on more than twenty years' possession by himself and those under whom he claims.

It is abundantly proved by the evidence in the cause, that the use of the water in Coles run was originally applied for as a loan; that it was granted without consideration, as a loan; and that its subsequent enjoyment was never claimed, otherwise than as a loan; and the bill puts it on this ground. The loan continued for more than twenty years, when Coalter, who had become the owner of the land below the point at which the water of the run had been diverted, wanting the water for his

own purposes, removed the obstructions which caused the diversion, and restored the water to its ancient channel. Hunter filed his bill to enjoin this proceeding, and the chancellor granted, and afterwards perpetuated the injunction.

The chancellor founds his opinion on a dictum of Lord Ellenborough, in the case of *Bealey v. Shaw*, 6 East, 208, that "twenty years' exclusive enjoyment of water, in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of parliament." This doctrine of Lord Ellenborough, understood as he intended to apply it, is perfectly correct; but the language which he uses, even in that case, and in the sentences immediately preceding, will show that he never thought of applying it to a case like this. He says: "The general rule of law, as applied to this subject, is that, independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own lands, without diminution or alteration. But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by the means of the exercise of certain trades; yet if the occupation of the party so taking or using it has existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right;" and then follows the remark on which the chancellor relies. It is clear, then, that he meant an enjoyment adverse to the right of the other party. He meant an enjoyment that excludes the idea of its being founded and continued in the loan, leave or favor of the other party. It is of the very nature of presumptive proof, that it yields to that which is positive. When a loan is positively proved, how can we presume a grant?

The law on subjects of this kind is well laid down in *Campbell v. Wilson*, 3 East, 294. That was a right of way. The party who had been obstructed in the use, had been in possession of it for more than twenty years. The judge at *nisi prius* instructed the jury: "That if they were satisfied that the enjoyment of the way was adverse, and that it had continued upwards of twenty years, it was sufficient ground for presuming a grant; that the use of a road, as matter of right, by those who claimed it, and submitted to as matter of right, by the possessor of land through which it passed, was to be considered as an adverse enjoyment; but that if the enjoyment had been by

leave or favor, or otherwise than under a claim of right, it would repel the presumption of a grant." This instruction was concurred in by the whole court of king's bench. If authority were desired in a case so strongly supported by reason, it would be difficult to imagine authority more apposite.

Upon the merits, therefore, the decree of the chancellor should be reversed and the bill dismissed; but, if the merits were otherwise, the bill should be dismissed for want of jurisdiction. If Hunter had been in the actual enjoyment of the use of the water and had reasonable ground to apprehend that Coalter intended to deprive him of that enjoyment, an application to the chancellor to prevent this threatened injury might have been proper. But Coalter had actually removed the obstructions in the bed of Coles run, and had restored the water to its ancient channel before the application made to the chancellor. There was, then, no ground for his going into equity. A court of law was open to him, and was the proper forum for trying the right to the use of the water and for giving damages for any obstruction of its enjoyment. On this ground, also, the decree should be reversed and the bill dismissed, with costs.

As to the case of *Hunter v. Coalter*, it is clearly not a case for a mill under the act of assembly. The law gives the court no power to condemn lands for a tail-race; and this point is sufficient to put an end to the case, without deciding the other questions made in the argument; but if this were a proper case for a mill, the order giving leave to establish it was rightly reversed for its uncertainty. The jury suggested three plans, in each of which the damages were different, and in one of which the health of the neighborhood would be injured. The county court established the mill generally, without confining the applicant to either plan.

The judgment of the superior court is, therefore, correct so far as it reverses that of the county court, and gives the costs in the said county court, but is incorrect in not having dismissed the petition. It is therefore reversed, and this court proceeding, etc., dismisses the petition, but the appellee, being the party substantially prevailing, is to recover all costs.

PROPERTY IN WATER.—This subject is discussed in the note to *Gardner v. Newburgh*, 7 Am. Dec. 531; see also *Campbell v. Smith*, 14 Id. 400. A grant of a stream of water cannot be made except by a deed duly executed, but such a grant may be presumed from an adverse possession for twenty years: *Bullen v. Runnels*, 9 Am. Dec. 55; *Strickler v. Todd*, 13 Id. 649; *Campbell v.*

Smith, 14 Id. 400. A water right incident to the ownership of land will pass under the word "appurtenances:" *Strickler v. Todd*, 13 Id. 649, and note. The diversion of a stream of water may be enjoined in equity: *Gardner v. Newburgh*, 7 Am. Dec. 526.

STUART'S HEIRS v. COALTER.

[4 RANDOLPH, 74]

WHERE A GENERAL DEMURRER TO A BILL would hold, the court will not grant relief, even though the defendant answer.

EQUITABLE JURISDICTION AS TO BOUNDARIES.—A court of chancery has no jurisdiction to settle boundaries unless some equity be superinduced by act of the parties.

IN A PARTITION SUIT the title is not meddled with, but the plaintiff must show a clear legal title; hence, if he prays a settlement of boundary and a decree for the delivery of land in the defendant's possession, it is not a proper case for partition in equity.

PARTITION AND ADJUSTMENT OF BOUNDARIES cannot be prayed in the same suit, where the defendants against whom the latter relief is sought are merely coterminous land-owners not affected by the equity as to partition.

A BILL IS MULTIFARIOUS and demurrable which unites separate, distinct and unconnected claims against several defendants.

PLAINTIFF MAY SUE IN ONE EJECTMENT all persons in possession of any part of the land he claims. (*Per CARR, J.*)

APPEAL from the Staunton chancery court. The facts are stated in the opinions of the judges.

Wickham, for the appellants.

Leigh and Johnson, for the appellee.

CARR, J. The bill states that John Switzer died intestate, seised and possessed of a tract of land within the Beverley manor, in the county of Augusta; that the heirs of said Switzer entered upon the said land, and remained in possession thereof until a few years since, when they sold it to a certain John Coalter, a brother of the plaintiff; that some of the heirs made a deed to the said John (which is exhibited), and the others have either executed deeds or are ready to do so at any time; that although the contract was made with the heirs by the said John, and the conveyances taken to him, the purchase was for the benefit of the plaintiff as well as the said John; that accordingly, the plaintiff has been put into possession of his undivided part of the said land, his right to which is not disputed by his brother; that since the purchase, the plaintiff has had the land surveyed, a plat of which is exhibited; that this plat, as he believes, correctly describes the boundaries of the land;

but he discovers that a part of the boundary is controverted by some of the coterminous tenants, to wit: Robert Stuart, Reuben Withers, and the heirs and devisees of Neil Adair; that the plaintiff is desirous of making partition with his brother, but can not because of the uncertainty caused by this dispute about the boundary; that he is anxious, also, to have the question of boundary settled, but not having the legal title can not go into a court of law; and if he could, it would require a multiplicity of actions. He therefore prays that his brother John, and the coterminous tenants may be made defendants; that the true boundary of the land may be settled; that the defendants be compelled to deliver to him any land within the boundary of which they may be found in possession; and that partition be decreed between himself and his brother.

The defendant, John Coalter, answers, stating that his interest in the land is one seventh part; that he wishes a partition; is ready to convey, etc.

The coterminous tenants answer, showing various objections to the plat, and pretensions of the plaintiff; deducing their titles, which seem entirely distinct and unconnected with each other; and each one contending for his lines, as heretofore established and understood.

Evidence was taken, surveys had, and the chancellor, on the hearing, established certain lines, from which decree the appeal is taken.

It was contended in the argument that this was a case of which equity had no jurisdiction. This question, will, of course, be considered first, as jurisdiction precedes discretion; and before we undertake to decide what ought to be done in a cause, we should always ascertain whether we can rightfully do any thing. I will not quote authorities to show that where a general demurrer would hold to a bill, the court, though the defendant answers, will not grant relief upon the hearing of the cause. The doctrine is too well settled. To deny it, would be to say that, however unfit the cause for equity, the defendant, by failing to demur, could oblige the court to entertain jurisdiction. Nor can I conceive that in deciding the question of jurisdiction, we should be influenced at all by the case made by the evidence. It is the province of the bill to state the case. It is from this we must judge. If the evidence fit the case stated in the bill, it could, of course, have no influence. If it made a different case, so far from giving jurisdiction where the bill did not, it would prevent a decree, where the bill was perfect; for the allegation and the proof must "jump together."

The bill places the jurisdiction on three grounds: 1. That the plaintiff wants partition, and can not have it without the aid of equity; 2. That there is a trust between the plaintiff and his brother, who has the legal estate, which the plaintiff not having, can not try the question of boundary at law; 3. That if he could, there must be a multiplicity of suits, to avoid which equity takes jurisdiction.

I will first show from authority the general rule, that equity can not hold plea of land titles; and then inquire, whether the plaintiff's case falls within, or is taken out of that rule.

In *Welby, appellant, v. The Duke of Rutland, respondent*, 2 Bro. P. C. 39, the bill charged that the plaintiff, and those under whom he claimed, had been in possession of the manor of Denton for more than one hundred years; that the defendant had set up a claim to it, and exercised several acts of ownership, which might hereafter bring a cloud upon the plaintiff's estate, and prevent his selling it. The bill, therefore, prayed that the defendant might set forth his claim, and produce his title papers; that the testimony of the plaintiff's witnesses might be perpetuated, and proper issues directed to try the defendant's claim to the manor, etc. The defendant pleaded and answered. The case was heard and dismissed by Lord Chancellor Apsley; and on appeal to parliament, the appeal was dismissed, and the decree affirmed. In the discussion of the case, the law on the subject was laid down in the clearest and strongest manner. It was said: "The general practice of courts of equity, in not entertaining suits for establishing legal titles before they have been tried at law, is founded upon clear reasons, and the departing from that practice, when there is no reason for so doing, would be subversive of the legal and constitutional distinctions between the different jurisdictions of courts of law and equity; and though the admission of a party in a suit, is conclusive as to matters of fact, or may deprive him of the benefit of a privilege, which, if insisted on, would exempt him from the jurisdiction of the court; yet no admission of parties can change the law, or give jurisdiction to a court of a cause of which it hath no jurisdiction. Agreeably hereto, the established and universal practice of courts of equity is to dismiss the plaintiff's bill, if it appears to be grounded on a title merely legal, and not cognizable by them; notwithstanding the defendant hath answered the bill, and insisted on matter of title, and it can make no difference whether the legal title be insisted on by the answer, or by the plea; that nothing hath a

greater tendency to introduce uncertainty in the law than the giving way to new exceptions to general, settled and known rules of practice in courts of justice; and therefore no such exceptions ought to be allowed, but upon the clearest grounds. The general known practice of courts of equity has been to dismiss bills brought like the present, for establishing a legal title, and for a perpetual injunction, before such title has been tried and determined at law. The exceptions to this general rule of practice are but very few, well known and founded on strong and clear reasons; but the appellant's case fell not within any of these exceptions, and consequently ought to be governed by the general rule. The bill was entirely new, and without a precedent." To show that this, though the argument of counsel, is considered as the true doctrine on this subject, Maddock, vol. 1, p. 135, lays down the rule precisely as it is here, and refers to this case alone in support of his position.

Chancellor Kent, also in *Abbott v. Allen*, 2 Johns. Ch. 519 [7 Am. Dec. 554], says: "This court may, perhaps, try title to land, when it arises incidentally; but it is understood not to be within its province when the case depends on a simple legal title, and is brought up directly by the bill. The power is only to be exercised in difficult and complicated causes, affording peculiar grounds for equitable interference. This was the doctrine laid down by the respondent's counsel, in the case of *Welby v. Bulland*, 2 Bro. P. C. 39; and it appears to have been sanctioned by the court." The case here referred to is the one from which I have extracted the above remarks. The chancellor also refers to Wightwick's Reports, 184, where the same doctrine (he says) is discussed at large, and emphatically laid down by Baron Wood, and not denied by the other barons. The cases above cited acknowledge that there are a few exceptions to the general rule. They will be found of the class described by Mitford, 127. He says: "Where one general legal right is claimed, against several distinct persons, a bill may be brought to establish the right: 2 Atk. 484. Thus where a right of fishery was claimed by a corporation, throughout the course of a considerable river, and was opposed by the lords of manors, and owners of land adjoining, a bill was entertained to establish the right against the several opponents, and a demurrer was overruled:" 1 Atk. 282. But, even where the bill is to try one general right against many claimants, and so to save a multiplicity of actions, it is generally required that the plaintiff shall have established his title at law, before he comes

into equity; and Mitford adds, if he has not done so, and the right he claims has not the sanction of long possession, and he has any means of trying the matter at law, a demurrer will hold: 2 Atk. 391. In *Mayor of York v. Pilkington etc.*, 1 Atk. 284, Lord Hardwicke says: "It is a general rule that a man shall not come into a court of equity, to establish a legal right, unless he has tried his title at law, if he can; but this is not so general an objection as always to prevail;" and he refers to two cases in precedents in chancery. I find them to be thus: *Bush v. Western*, Prec. in Ch. 530. The plaintiff had been in possession of a water-course upwards of sixty years. Defendant disturbed him in the use of the water. He brought his bill to be quieted in his possession. Objected that his remedy was purely legal; but the court overruled the objection, considering, I presume, that a possession of upwards of sixty years was equal to a decision of law in his favor; and therefore the bill to quiet his possession was proper, as otherwise the plaintiff would have had to bring continual actions of trespass for every disturbance.

The other case is *Dorset v. Girdler*, Prec. in Ch. 531. Bill to examine witnesses in *perpetuam rei memoriam*, to establish his sole right of fishery. Demurrer, for that plaintiff had not verified his title at law. But the demurrer was overruled, and this difference taken by the court, that "if one is out of possession, having only a right to fishery, etc., he who brings such bill ought never to be allowed to do so, but a demurrer to it will be good, because he may and ought, first to enter his action and establish his title at law, etc., for the party having a remedy at law, the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method of discovering the truth. But, if a man is in actual possession, and is only threatened with disturbance by another who pretends a right, he has no other way in the world to perpetuate the testimony of his witnesses but by such a bill as this." *Lord Tenham v. Herbert*, 2 Atk. 483: Bill to establish a right to an oyster fishery, and to be quieted in the possession of it, against defendant, who claims the piece of ground where the fishery is. Demurrer, as it is a matter properly triable at law. Lord Chancellor: "Undoubtedly there are some cases where a man may come, by a bill of this kind, into this court first, and there are others where he ought first to establish his right at law. Where a man sets up a general exclusive right, and the persons who controvert it with him, are very numerous, and he can

not, by one or two actions at law, quiet that right, he may come into this court first; which is called a bill of peace, and this court will direct an issue to try the right. But, where the question about a right of fishery is only between two lords of manors, neither can come into this court, till the right is first tried at law. This is in the nature of an ejectment bill," etc. *Benison v. Ashley*, 2 Ves. jun. 459: Bill for discovery and delivery of a settlement, under which plaintiff claimed, and other title deeds, and possession of the estate. Demurrer to all the relief, and all the discovery, except of the settlement, for want of equity, and answer admitting the settlement, and offering to produce it. Lord Chancellor: "This is a pure ejectment bill, as to the title to the land. The only allegation calling for an answer, is as to this deed. The court will direct it to be produced at the trial, but no more. The plaintiffs have no right to a discovery of the pedigree, unless they lay a foundation for it; otherwise, no man would bring an ejectment which had any complication in it. The cases cited for the bill go no further than this; that the loss of the instrument with the affidavit, entitles the plaintiff to a decree *quoad* the matter; the loss of a bond gives a right to a decree for the money, and so of a deed. I agree no general demurrer could be put in to such a bill. The jurisdiction is transferred to a certain extent. But what is the equity here? Is it possible for me to decree, that the deed shall be delivered up? There is no allegation of infancy, a term outstanding, or that possession was gained by undue means. The plaintiffs state, that under color of a legal title, the defendant entered as heir, which title they deny. The only relief I can give, is to enable them to make out their title at law." He adds: "This is another of the fishing bills, which I do not like to see in this court:" *Weller v. Smeaton*, 1 Bro. C. C. 572. Bill to be quieted in the possession of a mill, and that defendants may pull down works above it, and be restrained from erecting others. Demurrer, because plaintiff had not established his right at law. Allowed.

I will refer to but one case more, *Speer v. Crawler*, 2 Meriv. 410. It is important in its bearing on this subject, both as containing the strong opinion of that able and learned judge, Sir W. Grant, and as giving the best account of a sort of jurisdiction, exercised by equity for a while, respecting the boundaries of land, which he considers as originating in consent, which was disapproved of by their greatest chancellors, and soon abandoned. He cites the case of *Wake v. Conyers*, 2 Cox, 360, where

Lord Northington refused this jurisdiction, which he said had been "assumed of late;" and two cases, in which Lord Thurlow had done the same. He then adds: "In the same case of *Wake v. Conyers*, Lord Northington says, that in his apprehension this court has simply no jurisdiction to settle the boundaries even of land, unless some equity is superinduced by act of the parties. I concur, he says, in that opinion, and think that the circumstance of a confusion of boundaries furnishes, *per se*, no ground for the interposition of the court."

Having shown that this court has no jurisdiction to interpose in questions of real property, unless some equity be superinduced by act of the parties, let us see whether any such foundation is furnished by the case.

The plaintiff wants a partition; but, in a suit in equity for partition, the legal title of the parties is never meddled with by the court. The jurisdiction is not given by statute, but assumed from the extreme difficulty and inconvenience of proceeding at law. In exercising this jurisdiction, equity has considered itself bound by the principles which govern cases of partition at law; and these being only between joint-tenants and tenants in common, the question of title cannot well arise. The individual rights of the parties to participate in the division, or to call for it, may come up; but not the simple question of conflicting title to the tract of land. Accordingly it is established by the cases that a plaintiff who comes into equity for partition must show a clear, legal title. If there be doubt about that, he will not be aided: See *Wiseley v. Findlay*, 3 Rand. 361 [*ante*, 712], where this subject was examined. This case, then, where the bill prays a settlement of boundary, and that the defendants be decreed to deliver to the plaintiff any land of his they may be in possession of, can not be a proper case for partition in equity.

But there is another objection. The equity, as to partition, does not reach, or affect in the slightest degree, the coterminous tenants. They are wholly unconnected with it. They have done no act superinducing equity, and can not by the acts of others, be drawn away from the proper tribunal for deciding legal titles. This applies also to the ground relied on, that as between the plaintiff and his brother, or the heirs of Switzer, there is a trust which gives equity jurisdiction. The coterminous tenants, holding distinct tracts of land by distinct and unconnected titles, have nothing to do with this trust or equity. If the brother refuses to permit the plaintiff to use the legal

title for settling the boundaries at law, or the Switzers refuse to convey, a bill against them for these purposes would receive proper aid. But it is nowhere suggested that John Coalter had refused to proceed at law, or to suffer the plaintiff to use his name; and as to the Switzers, they are no parties, and it is expressly stated that they have either all conveyed or are ready at any time to convey.

It is said that this proceeding will save multiplicity of suits at law, and, therefore, equity should interfere. The first answer to this is, that it would not save multiplicity of suits; for John Coalter might have sued, in one ejectment, all persons in possession of any part of the tract he claimed: *Coleman v. Dick et al.*, 1 Wash. 239; but, secondly, this is not one of those cases where equity does interfere to prevent multiplicity of actions. That interference is given only in cases where one general right is invaded, as a right to a sole fishery of a river, etc.: *Mitf.* 147. But here the rights of the parties were separate, distinct, and unconnected; and the bill was for that reason also demurable. In *Mitf.* 146 it is said: "The court will not permit a plaintiff to demand, by one bill, several matters of different natures against several defendants; for this would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the state of the several claims of the other defendants, with which he had no connection. A defendant may, therefore, in such case demur:" See, also, 2 Mod. 234; *Harrison v. Hogg*, 2 Ves. jun. 323.

I think the decree should be reversed, and the bill dismissed, perhaps without prejudice to the legal rights of the plaintiff, or rather of his trustee.

GREEN, J. John Coalter, having purchased a tract of land from the heirs of Switzer, two of whom had conveyed to him, and the other five of whom had not conveyed, Thomas S. Coalter filed his bill against John Coalter, Robert Stuart, Reuben Withers, and the heirs of Adair, alleging that although the purchase was made by John Coalter, it was made for his benefit as well as for John's. He does not state what proportion belonged to each, but states that he has been put into the peaceable possession of his undivided part, John not contesting his right; that he is desirous of having a partition with his brother, but that having no legal title he can not proceed at law for that purpose; and that the other defendants, being coterminous tenants of other lands, dispute the boundaries, which prevents a partition, and that these boundaries can not be settled at law

without a multiplicity of suits. He, therefore, prays that the defendants, the coterminous tenants, may state in what points they dispute the boundaries; that the court may settle and adjust the true boundary; and that he may be quieted in possession accordingly, and the defendants decreed to deliver to him possession of any land within the true boundary which they may have taken possession of, and that partition between him and his brother may be decreed. It is not alleged that John refuses to make partition; and the heirs of Switzer, who have not conveyed, are not made parties. It appears also that the coterminous tenants hold severally, and do not claim under the same title.

The question is, whether a court of equity has jurisdiction to give the relief prayed for; I think not. It has always been held as a general rule, that equity can not hold pleas of land: 20 H. VI, 32, b. And in the case of the *Earl of Worcester v. Sir Moyle Fynch*, 2 And. 163, pl. 89; and 4 Inst. 85, it was held by all the judges of England, that if the question, whether there was such a manor as A. in deed or reputation, at such a time; or whether lands in B. were at that time parcel of the manor or not; or if a disseisin be alleged to be committed of Blackacre, at the time of a bargain and sale made to the complainant thereof; or if A. conveys land to B., and A. has only a matter of equity to be relieved by, or only a right at the time; or when any title of freehold, or other matter determinable by the common law, comes incidentally in question in chancery, that in all these cases the court of equity has no jurisdiction, and such matters should be tried at common law, and not in chancery; that the party may be relieved by writ of error, attainr or action of a higher nature, and that if the plaintiff prays discovery from the defendant, without which he can not sue at common law, and the defendant makes title to the land, the plaintiff can not proceed for the land in chancery; for otherwise, by such a surmise, inheritances, freeholds and matters determinable at common law should be determined in chancery. To this general rule, there is an exception, where the plaintiff has an equity against the defendant himself, as, if a tenant holds adjoining lands of his own, and fraudulently or carelessly, contrary to his duty to preserve the rights of his landlord, confounds or destroys the evidence of the boundaries. There the landlord, who can not sue at law during the term, or who could not after the term establish his boundary at law, may sue the tenant in equity, not for the purpose of establishing his boundary, but for having a

decree that the tenant shall transfer to him so much of his land as will make up the original quantity belonging to the landlord. In such case, if the actual boundary was proved by the tenant, the suit would fail, and in this way the question of boundary may properly be discussed, and virtually settled in chancery.

It appears, that for a short time, some sort of jurisdiction was assumed by the court of chancery in respect to boundaries. The cases are collected in 4 Vin. Abr. 422, 423; but the jurisdiction, which originally arose from consent by analogy to common law writs, was soon repudiated. This subject was examined by the master of the rolls in *Speer v. Crawler*, 2 Meriv. 410, in which all the former cases were cited. In this case, the master of the rolls concurring with the opinions of Lord Northington and Lord Thurlow, affirms that there is no jurisdiction, unless some equity be raised by the acts of the parties; and observes, that to the exercise of the jurisdiction upon such equitable grounds, no objection has ever been made. "But, on what principle can a court of equity interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the legal mode, in which questions of property are to be decided?"

There is, in this case, no shadow of equity between the plaintiff and the defendants, who claim title to the adjoining lands; and any equity between him and the holders of the legal title, the Switzers, who have not conveyed, and John Coalter, can not affect them, unless there was a fraudulent combination between them and the holders of the adjoining land to injure the plaintiff, which is not suggested; and even in that case they could not be called upon in equity to ascertain the boundaries. The only relief the plaintiff could have would be to aid the plaintiff so far as to compel the owners of the legal title to permit him to sue at law in their names. John Coalter, in whom is the legal title to an undivided two sevenths of the land, might sue at law, and establish the boundary of the entire tract of land, and he is not stated to be unwilling to sue. Indeed, he might have sued all who claimed any part of the land, in one ejectment, if they were in possession of the controverted land; so that a resort to equity does not prevent multiplicity of suits.

The observation, that the plaintiff has no equity against the adversary claimants of the land, is an answer to all the cases cited by the appellee's counsel in which the jurisdiction is founded on the equitable nature of the plaintiff's title. In the case of an assignee of a bond there is, in equity, a privity of

contract between him and the debtor. In the case of property seized under execution, which is conveyed in trust for another, the relief given to the *cestui que trust* is, upon the equity of preserving the specific property to the true owner when it is of such a nature as not to be compensated in damages, an equity which exists in favor of the legal, as well as equitable, owner. The property might be eloiigned and an action of detinue might not restore the specific property; but land can not be eloiigned. In the case of a tract of land conveyed to be sold for payment of debts, and the property claimed in whole or in part by another, the court may, in proper cases, interfere at the instance of the debtor, to prevent a sale until the question of title is determined, because a sale might do him irreparable injury. But in that case the title of the adverse claimant could not be settled in equity or in that suit.

Nor can the equitable jurisdiction, to decree partition, justify an investigation of the legal title of one who claims adversely against all who claim partition. Where several claim to be entitled to partition the court may inquire, as between them, which of them are entitled to come into the partition, and thus, incidentally, determine the legal title as between them. But even in that case, if the legal title of one party is disputed by the others, as if they allege the deed, under which he claims, to be forged, the bill for partition will not be entertained, and the parties will be left to litigate the title at law. This subject was examined in the late case of *Wiseley v. Findlay*, 3 Rand. 361 [*ante*, 712]. In this case there does not appear to have been an adversary possession; and the partition might have been made without involving the coterminous tenants in the suit.

This seems to be a bill *quia timet*, not justified by the principles upon which such bills are allowed. If this jurisdiction of the court of chancery could be sustained, all cases of title and boundary of lands might be transferred to it, contrary to the bill of rights, which declares, that "in controversies in respect to property, the ancient trial by jury, is preferable to any other, and ought to be held sacred."

There is another objection to this bill. It is multifarious. It calls upon Stuart, Adair and Reuben Withers, claiming severally different parts of the land claimed by the plaintiff, to defend one suit. They claim nothing in common; neither is at all interested in the defense to be made by the other; and yet, if the plaintiff succeeded against one only, he would be liable to pay the costs of the plaintiff, expended in the prosecution of

his claims against the others. It is not alleged that the whole controversy between all the parties depends upon the establishment of one line. That is not the fact; and if it were, the possession of one of the defendants might give him a right which the other had not.

I think the decree should be reversed and the bill dismissed.

COALTER, J. As to the question of jurisdiction, I understand it to be admitted that as no demurrer was filed to the bill on that ground, we are not confined to the statements in the bill alone in considering that question; but if the proofs or documents in the cause (all pertinent to the issue, as in this case) show a ground of jurisdiction, which, had it been relied on in the bill, would have supported that jurisdiction on demurrer, it must be looked to and considered in the same manner as if stated in the bill. If this be correct, it will be found that the following circumstances, having, as it seems to me, a strong bearing on this point, are to be found in the cause in addition to the grounds alleged in the bill.

It appears, from the survey returned by order of court in the cause, that almost the whole controversy, as it respects boundary, which exists between the appellee and the Adairs, and also between him and Stuart, depends on the establishment of the Beverley manor lines, as both parties claim to hold by those lines.

The Beverley manor is a large tract, comprehending a considerable portion of Augusta county. It was sold off in parcels to settlers. Amongst others, one Patton obtained a deed for a considerable tract, binding on some of the southern limits of the manor, and part of which is now claimed by the appellee. Stuart, an ancestor of the appellants of that name, obtained another tract adjoining Patton, and binding also on the southern boundary of the manor. After this, Stuart obtained a grant from the crown for lands on the south of the manor, and calling to be bounded by the manor line, and joining not only his own lands within the manor, but those also of Patton. So, too, some one else, under whom the Adairs claim, obtained in like manner a grant from the crown adjoining Stuart's grant aforesaid, and calling for the manor lines, to wit, a portion of that line called for by Stuart's grant and two other of the manor lines lying east of it. One of the manor lines then is common to both of these grants, and as it cannot exist in two places, if it is rightly determined to exist in one place in regard to Stuart, it must exist in the same place as to the Adairs. The

establishment of this line, too, must fix one of the corners of the next line eastward, where the Adairs alone are interested; and so, *vice versa*, the establishment of that line must fix one of the corners of that which bounds Stuart's land. Thus, if E F is established as the true manor line as to the Adairs, this fixes F as the corner of the line, by which Stuart is to be bounded, and of course, his pretensions must be negatived; but in establishing this line, all the evidence and circumstances in relation to the lines A B, B C, C D and D E are to be weighed, and are equally important to the Adairs and Stuart. So if G F is established as the true manor line in regard to Stuart, and in a contest with him, it fixes F as a corner of the line of the Adairs, and of course disaffirming their pretensions. But whether this is the true line or not, depends not only on the evidence as it regards the lines A B, etc., as aforesaid, but on the evidence concerning the lines G H, I K, J L, L M, and indeed, all the other lines laid down in the plat, in relation to this part of the boundary. It is an unquestioned fact, then, as to this matter, that although Stuart and the Adairs claim distinct tracts by distinct titles, the question of boundary, so far as the manor lines are concerned, depends precisely on the same evidence in relation to every portion of the plat and controversy as to each. The case can not be correctly decided differently as to these parties; for, if decided differently, one or the other of those decisions must as surely be wrong, as that the same thing can exist in two places at the same time.

It seems, then, that if each controversy is to be correctly decided, in other words, if there ought not to be opposing decisions, the matter ought to be settled in one suit, if that be practicable. Suppose two suits are brought for the purpose, and in that against Stuart, F G is decided to be the manor line, such decision might have, and probably would have, considerable influence in the controversy with the Adairs. They ought to guard against this by giving Stuart all their aid; for, in deciding the matter as to Stuart, the whole survey and evidence, as well as it regards the Adairs as Stuarts, are important in that controversy, and must be considered. But the Adairs, not being parties, are not bound by that decision, and they have the question tried over again on the same surveys and evidence, and Z Y is fixed as the boundary or manor line. Which verdict is to prevail? And if both are to stand, the boundaries of the appellee are entirely destroyed, for no one can say which is the manor line. Thus two suits, depending

on precisely the same surveys and facts, and in which there may be different decisions, are to go on at precisely double costs and trouble to all parties.

Had this ground of jurisdiction been stated in the bill, would it have been proper to have sustained a demurrer and to have turned the parties round to several suits at law? It may be said that one ejectment could have been brought against all the defendants, so as to have tried the matter in one suit. If this could be, had not that action been barred by length of time, yet from the evidence it seems probable this would have been the result, at least, as to some of the lands and some of the parties; and, if the party had been driven to his writs of right, it might have been very unsafe to have counted for his whole tract of land against all the defendants. His safest course in either action, most probably, would have been by separate suits.

Although consent of parties will not give jurisdiction, yet if, to a bill framed on the real facts as they now appear, the defendants had admitted those facts and submitted their case to the jurisdiction of the court, as the safest and best course for all the parties, would it have been expedient, after the whole matter was thus fully and fairly before the court, to have dismissed the bill for want of jurisdiction? I am not prepared to say that it would. I have not had access to many of the authorities cited on this point, but I think the principles laid down in the case of the *Mayor of York v. Pilkington et al.*, 1 Atk. 282, go to support the jurisdiction in this case.

There was another difficulty in this case. Thomas Coalter has only the legal title to a small undivided portion of this land, the title to the residue still remaining in the other heirs of Switzer; so that he might have found some difficulty in suing at law. This title, it is true, they may be willing to make as the bill states, but when it will be in the power of the party to get it in does not appear. They are numerous and may be dispersed, and in the meantime, if the boundary can be settled, there will be no actual controversy remaining, and partition may be made.

On the whole, and believing that few cases can occur so peculiarly situated as this, I incline to support the jurisdiction of the court, instead of turning the parties round to the variety and number of suits at law which their case may require, in which there may be contradictory decisions on the very same evidence, both of which can not be right.

This inclination, however, is not without many doubts, which are greatly increased by the opposing opinions of my brethren.

CABELL, J., was of opinion that the decree should be reversed, which was entered as the decree of the court.

CONFUSION OF BOUNDARIES—EQUITY JURISDICTION.—“The issuing of commissions to ascertain boundaries is certainly a very ancient branch of equity jurisdiction:” 1 Story’s Eq. Jur., sec. 610. The origin of this jurisdiction is, however, wrapped in obscurity: Note to *Wake v. Conyers*, 2 Lea. Cas. in Eq. 438 (4 Am. ed.); 1 Story’s Eq. Jur., sec. 611. In *Wake v. Conyers*, 1 Eden, 331, S. C., 2 Lea. Cas. in Eq. 433 (4 Am. ed), Lord Keeper Henley, afterwards lord chancellor and Earl of Northington, conjectured that the allowance of this remedy in such cases arose from the familiar equity of preventing a multiplicity of suits, and Sir Wm. Grant, master of the rolls, seemed, in *Speer v. Crawler*, 2 Meriv. 416, to be of the opinion that the origin of the jurisdiction was to be sought in certain ancient writs in the register: *De rationalibus divisis* and *De perambulatione facienda*, Reg. Brev. 157, b; and that the remedy first being allowed by consent of parties, where mutual boundaries were in dispute, was afterwards extended to cases where the plaintiff had some equitable right against the defendant, which could not be otherwise enforced. In the learned note of Messrs. White and Tudor to *Wake v. Conyers*, 2 Lea. Cas. in Eq. 439, before referred to, it is suggested as not improbable that equity is indebted for this branch of its jurisdiction to the civil law, from which it has borrowed so much that is valuable in its system of jurisprudence, and that this remedy was fashioned out of the *Actio finium regendorum*: Dig., lib. 10, tit. 1, l. 1; Domat bk. 2, tit. 6, secs. 1 and 2. Mr. Justice Story also refers to this proceeding of the civil law, as being a more extensive application of the same principles which lie at the foundation of this branch of equity jurisdiction: 1 Story’s Eq. Jur., sec. 614.

Whatever may have been the origin of the jurisdiction, it is at least certain that in the earlier cases its limits were not very clearly defined, so far as can be gathered from the brief notes of those cases in Tothill and other reporters. From some of those cases it would seem that the chancellor took jurisdiction and issued a commission wherever the boundaries of the plaintiff’s and defendant’s lands were confused, without reference to any other equity between the parties. Thus in *Mullineux v. Mullineux*, Tothill, 39, in 14 Jac. I., the court ordered that a commission “go forth to set out lands that lie promiscuously to be liable for the payment of debts.” In *Peckering v. Kimpton*, Tothill, 39, in the fifth year of Car. I., a commission was issued “to set out copyhold land from free land which lie obscured; if the commissioners cannot sever it, then to set out so much in lieu thereof.” In this case, however, we catch a glimpse of a principle upon which many later decisions have been based, for there seems to have existed between the parties the relation of lord and tenant, which is now recognized as a satisfactory ground for the exercise of this jurisdiction.

If, as some of the older cases would seem to indicate, confusion of boundaries was formerly regarded as an original and independent equity, sufficient to warrant a court of chancery in taking jurisdiction, it is clear that in later decisions this broad doctrine has been entirely abandoned. Indeed, the jurisdiction is one which is not now favored in courts of equity, owing to their aversion to trying questions of legal title, merely for the sake of a consequen-

tial benefit. As was said by McDonald, C. B., in *Atkins v. Hatton*, 2 Anst. 386: "It is a jurisdiction which the courts have always been very cautious of exercising," and "there is no instance of the court ever granting a commission, in order to attain a remote consequential advantage." The doctrine seems now to be therefore that confusion of boundaries is a mere incidental equity, not of itself sufficient to authorize the interposition of a court of chancery, but that it must be coupled with some other equity between the parties, in order to afford ground for equitable relief.

MUST BE SOME OTHER EQUITY BETWEEN THE PARTIES.—It is accordingly settled, as laid down in the principal case, that a court of chancery will not undertake to settle obscured or confused boundaries of lands, "unless some equity is superinduced by the act of the parties," or of those through whom they claim: 1 Story's Eq. Jur., sec. 615; Adam's Equity, 237; *Wake v. Conyers*, 1 Eden, 331; S. C., 2 Lea. Cas. in Equity, 433, and note thereto; 1 Cox Ch. 360; *Speer v. Crawford*, 2 Meriv. 410; *Marquis of Bute v. Glamorganshire Co.*, 1 Phil. Ch. 584; *Lange v. Jones*, 5 Leigh, 192, approving the principal case; *Wolcott v. Robbins*, 26 Conn. 236; *Perry v. Pratt*, 31 Id. 433; *Doggett v. Hart*, 5 Fla. 215; *Hale v. Darter*, 5 Humph. 79; *Topp v. Williams*, 7 Id. 569; *Wetherbee v. Dunn*, 36 Cal. 249; *Norris's Appeal*, 64 Pa. St. 275. Said Lord Keeper Henley, in *Wake v. Conyers*, 1 Eden, 331; S. C., 2 Lea. Cas. in Equity, 433: "This court has, in my opinion (and if parties are not satisfied they have resort elsewhere), no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud, or confusion, where one party has plowed too near the other or the like; nor has this court a power to issue such commissions of course, as here prayed. In this case it is said there is no legal remedy, and therefore there must be an equitable one; but this does not follow unless there is an equitable right. If there is a legal right, there must be a legal remedy; and if there is no legal right, there can in this case be no equitable one."

In *Norris's Appeal*, 64 Pa. St. 275, complainant asked for the appointment of a commission to trace boundaries of land lying on the Delaware river, which had become confused through the obliteration and removal of natural and artificial monuments, and by the formation of alluvial accretions and deposits on the river bank; and it was claimed that this fact alone was sufficient ground for awarding the relief upon the general principles governing this branch of equity jurisdiction, although there was no peculiar equity between the parties; and that, if not, the jurisdiction to grant this remedy in such cases was undoubtedly conferred by an act of the legislature of April 5, 1859, relating to boundaries of lands in Philadelphia, providing that the jurisdiction of the court "shall extend to the ascertainment of disputed boundaries which have been confused or rendered uncertain by lapse of time, by natural causes, or by the act, neglect, or default of any present or former owner or occupant." The court held, however, that the case did not come within the ordinary jurisdiction of a court of equity, and that the act did not extend the jurisdiction to other classes of cases. Sharswood, J., delivering the opinion of the court, used the following language: "The legislature probably could not have been induced to adopt such provisions as these acts contain, at least in the sense which is claimed for them, for all parts of the commonwealth; for if the construction contended for be sound, they would draw within the maw of a court of equity all questions of disputed boundaries, including interfering surveys and settlements, which have been heretofore cheaply and satisfactorily committed to the determination of

courts of common law, with the necessarily accompanying right of trial by jury. Even in England the very limited jurisdiction exercised by the court of chancery upon the subject of boundaries has been justly regarded with great disfavor and jealousy." Then, after quoting a part of the opinion of Lord Keeper Henley, in *Wake v. Conyers*, 1 Eden, 331, the learned judge proceeds: "It was established as a principle in that case, which has been maintained and followed ever since, that the court has no jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties."

In *Whetherbee v. Dunn*, 36 Cal. 249, an action, in the nature of a suit in equity, was brought to settle a disputed boundary, and it appeared that there was no relation between the parties out of which any equitable right in the plaintiff could grow, but that it was merely a case in which one boundary was claimed by the plaintiff and a different one by the defendant; and the court therefore held it not to be a case within the jurisdiction of equity. Sanderson, J., in the course of his opinion, said: "The existence of a controverted boundary by no means constitutes sufficient ground for relief in equity; in all such cases the remedies at law are adequate. Before courts of equity will interfere, some equitable ground must attach itself to the controversy, such as fraud, or some relation between the parties which makes it the duty of one of them to protect and preserve the boundaries; or the prevention of a multiplicity of suits; or that the question affects a large number of persons, and the boundaries have become confused by lapse of time, accident, or mistake."

The case of *Perry v. Pratt*, 31 Conn. 433, arose upon a statute in Connecticut providing a method of ascertaining and settling boundaries obliterated by time, accident, etc. The boundary there was a brook which divided the plaintiff's and defendant's farms, and the bed of which had been changed by violent storms, high tides, etc. There was no peculiar equity between the parties, and the court held that but for the statute, relief could not have been awarded by a court of chancery. Butler, J., delivering the opinion, said: "The right to issue a commission to ascertain boundaries is necessarily limited by the rule that equity will not interfere where there is an adequate remedy at law. It is, therefore, confined to cases where there is some peculiar equity attached to the controversy respecting the lost bounds, arising out of the fraudulent or negligent misconduct of the respondent; where it is his duty to preserve the boundaries, and they can not otherwise be found or restored; to cases where a resort to equity is necessary to prevent a multiplicity of suits; and to cases where the power is necessarily exercised incidentally in furtherance of another equity. Controversies not presenting any peculiar equity, like the one in question, have been left to be settled by proceedings at law."

In the cases of *Hale v. Darter*, 5 Humph. 79, and *Topp v. Williams*, 7 Id. 569, also, equitable relief was denied because there was merely a controversy between adverse parties with reference to the location of their mutual boundaries, and because there was no peculiar relation between the plaintiff and defendant, or other ground of equitable jurisdiction. In *Hungerford v. Goreing*, 2 Vern. 38, a discovery was prayed of the boundaries of plaintiff's and defendant's lands, the bill alleging that the same fully appeared from deeds and writings in the defendant's possession, and the prayer was refused. It does not appear, however, from the meager report of the case, what was the precise ground of the decision.

WHERE THERE IS A SUFFICIENT LEGAL REMEDY in this class of cases, as

in all others, equity will decline jurisdiction. It is a uniform rule in equity not to try naked questions of legal title: *Abbott v. Allen*, 7 Am. Dec. 554; *Overseers v. Hart*, 3 Leigh, 3; *Bush v. Martins*, 7 Id. 324; *Hickman v. Cook*, 3 Humph. 640; *Alton etc. Ins. Co. v. Buckmaster*, 13 Ill. 201; *North Pa. Coal Co. v. Snowden*, 42 Pa. St. 488. Therefore, where it was claimed in the bill that a number of defendants had taken possession of lands belonging to the plaintiff, and had confused the boundaries, and the plaintiff prayed a discovery of the title deeds and a settlement of the boundaries, and a decree for possession and an account of the rents and profits, the bill was held demurrable: *Loker v. Rolle*, 3 Ves. 4. Lord Chancellor Loughborough, delivering the opinion of the court, said: "Upon the face of the bill it is quite clear, the plaintiff may draw a declaration in ejectment. The bill states the title, and that by some means or other the same persons are in possession of all the lands, and have confounded the boundaries. The only consequence is that the plaintiff may come for a discovery to know what are the farms, and who are in possession; but that never can entitle him to come for possession, and an account. He avers, contrary to the fact disclosed by his bill, that he does not know the lands. He describes the two farms and the tenement. If he had filed a bill for discovery only, he must have paid for the discovery; but it goes on to pray relief, that is merely an ejectment."

In *Metcalfe v. Beckwith*, 2 P. Wms. 376, a bill for the settlement of a disputed boundary was dismissed after an issue directed and a trial thereunder, on the ground that it might have been tried at law, and also because the issue had been found against the plaintiff. So in *North v. Stratford*, 3 P. Wms. 148, in a case of confusion of boundaries, relief was denied in equity because the remedy was at law. As a general rule, equity will not take jurisdiction to try a mere "ejectment bill." Thus, in *Tillmes v. Marsh*, 67 Pa. St. 507, the complainant alleged that he and the defendant owned houses on adjacent lots with an alley way between them, which, the complainant claimed, was wholly on his land, but that the defendant persisted in building over the alley and joining his house to the complainant's wall, and the prayer was for an injunction and for a settlement of the boundary. The court, Sharswood, J., delivering the opinion, held that this was a case for an ejectment at law, or for an action of trespass. So, in *Haskell v. Allen*, 23 Me. 448, the plaintiff and defendant had agreed upon a boundary line, and had it surveyed, and had occupied in accordance with it for several years, and the bill charged that afterwards the defendant entered beyond the line upon land claimed by the plaintiff and took timber and wood therefrom, and prayed that the surveyed line might be established as the true boundary, and that the defendant be decreed to release all claim to land on the plaintiff's side of the line, and to account for the timber, etc. The court held that the remedy was at law, and not in equity. But in *Lethieullier v. Castlemain*, Dick. 46, the sole ground upon which the bill was based seems to have been that the defendant had obliterated the boundary between his manor and that of the plaintiff, and had enlarged his park so as to include land claimed by the plaintiff, and yet relief was granted in equity by directing an issue to try the question of boundary, although the case would appear to have been one in which an action at law would have furnished an adequate remedy. And in order that a court of equity may take jurisdiction it must appear that it is impossible to settle the boundary at law. "In every bill for that purpose it is first necessary to show clearly that without the assistance of the court the boundaries can not be found." *Miller v. Warmington*, 1 Jac. & Walk. 491. It was said in *Lewis v. Lewis*, 4 Or. 177, that there was no reason why the pos-

tion of a lost stake or corner could not be as well ascertained in a court of law as by a suit in equity.

EQUITY MUST BE BETWEEN THE PLAINTIFF AND DEFENDANT.—The doctrine laid down in the principal case, that the superinduced equity necessary to support the jurisdiction of a court of chancery to settle a question of confused boundaries, must exist between the plaintiff and the defendant, and not between either of them and a third person, is well supported by authority. It must be an equity existing in favor of the plaintiff and against the defendant. Thus in *Miller v. Warmington*, 1 Jac. & Walk. 492, the parties claimed adversely to each other, there being no relation between them upon which an equity could be grounded, and the confusion of the boundaries had been made before the defendant came into possession; and the relief was for this reason denied. Sir Thomas Plumer, master of the rolls, delivered the opinion of the court, in the course of which he said: "But if the difficulty of finding the boundaries were established, it is clear the plaintiff does not stand in a predicament that gives him a right to apply for a commission. This is the case of persons claiming by an adverse title; there is no connection between them to serve as a foundation for the court to proceed on in ordering a commission. This subject was very luminously considered by the late master of the rolls in *Speer v. Crauter*, 2 Meriv. 410; and that case has settled that you must lay a foundation for this species of relief, not merely by showing that the boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims, of which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them. But the court will not interfere between independent proprietors, and confusion of boundaries *per se* is no ground to support such a bill. Here the crown and the plaintiffs claim independently of each other, and nothing is stated in the bill but the mere fact of the boundaries being confused. The case stated by the plaintiffs is, therefore, obviously open to this fatal objection."

It is thus seen, that if the defendant is a stranger to the equity upon which the jurisdiction is founded, it will be a fatal objection to the relief asked. On the same principle, also, *Lange v. Jones*, 5 Leigh, 192, was decided. Lange filed a bill for the specific performance of a contract, made by one Adams, for the sale of certain land, and made Jones a party defendant, on the ground that the latter was in possession of part of the land, and that the boundaries between Jones's land and that included in the contract of the plaintiff and Adams, were confused. A part of the relief sought was that the disputed boundary might be ascertained and settled. Here the defendant Jones was a stranger to the contract, to enforce which the suit was brought, and to the equities growing out of it, and the court approving and adopting the doctrine of the principal case, held that the relief could not be granted. Carr, J., said: "The case of *Stuart's Heirs v. Coalter*, was one very much considered, and, as I think, very correctly decided. I am entirely opposed to a departure from the principles there settled. The question is, whether the present case falls within the general rule, which inhibits courts of equity from deciding the dry legal title to lands. I think it does, clearly. It is a case of disputed boundary, whether the title of Adams, or that of Jones, to the land in controversy, was the best, and it appears upon the record that Jones was in possession. What, then, was to hinder Lange from suing him at law, upon the title of Adams?"

In the same case, Tucker, P. J., said: "In *Stuart's Heirs v. Coalter*, this court distinctly denied the jurisdiction of a court of equity to settle the

titles or boundaries of lands between adverse claimants, 'unless the plaintiff has an equity against the defendant claiming adversely to him.' This principle bears hard indeed, where a purchaser in possession, but having strong reason to believe that another has a better title, wishes to settle the controversy before he pays his purchase-money. On that matter, however, we give no opinion; but where, as in this case, the adverse claimant is in possession, there is nothing to impede the purchaser from proceeding at law to try title with him, in the meantime enjoining the recovery of the purchase-money."

In *Steel v. Baker*, 23 Gratt. 386, the doctrine of *Stuart v. Coalter*, on this point, was again approved, and it was held that in order to support the jurisdiction of a court of chancery in cases of this sort, there must be an equity existing between the plaintiff and the defendant.

RELIEF GRANTED ONLY IN AID OF TITLE.—It is laid down in a number of cases that equity will not undertake to settle a controverted or obscured boundary merely for the sake of a remote or incidental advantage. This branch of equity jurisdiction is to be exercised only for the purpose of confirming and securing the legal title. If the title is not involved in the controversy there is no room for this species of relief. Thus, in *Wake v. Conyers*, 1 Eden, 331, one of the principal grounds for refusing relief was that the object of the suit was solely to settle the boundaries of a manor, there being no question of title to the soil. The lord keeper said: "I have been, ever since I sat here, extremely jealous of the jurisdiction of this court over legal inheritances. I was, therefore, desirous that some precedent should be produced to show me that this court could entertain a bill of this nature to settle the boundaries of an incorporeal inheritance, but none such has been produced. There have, since I sat here, been several to fix boundaries where a right to the freehold of the soil has been incidental. But I have seen such frightful consequences arising from them that I think these suits are far from deserving encouragement. They originally came into this court under the equity of preventing multiplicity of suits; yet in those cases I have observed that they have been sometimes attended with more expense than if all the suits which they apprehended, and which they were brought to prevent, had actually been tried at law. * * * All the cases where the court has entertained bills for establishing boundaries have been where the soil itself was in question or where there might have been a multiplicity of suits."

In *Waring v. Hotham*, 1 Bro. C. C. 40, cited as *St. Luke's v. St. Leonard's*, in 2 Anst. 395, a bill was filed by one parish against another to settle their mutual boundaries for the purpose of avoiding confusion in levying their poor rates, but Lord Thurlow refused to entertain the suit, and is reported to have said that if he should do so and direct an issue in such a case he did not see what case would be peculiar to courts of law. He did not know how to extract a rule from *Mayor of York v. Pilkington*, 2 Anst. 395. Where there was a common right to be tried such a proceeding was to be understood; the boundary between the two jurisdictions was apparent. That is the case where the tenants of a manor claim a right of common by custom, because the right of all the tenants of the manor is tried by trying the right of one; but in this case he saw no common right which the parishioners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom on account of the poor laws. Here, also, it will be observed, although not particularly adverted to by the chancellor, that there was no question of title, and the object to be gained by the settlement of the boundaries was incidental and remote.

In *Atkins v. Hatton*, 2 Anst. 386, a bill was filed by the rector of a parish

for an account of tithes, and for the settlement of the boundaries of the pariah and the glebe, but the relief was denied so far as the question of boundary was concerned, because the object was "to attain a remote consequential advantage." And, because the relief is granted in this class of cases, only in aid of the title, it is necessary that the plaintiff should show a clear legal title to some land in the defendant's possession, which can not be distinguished, owing to the confusion of boundaries: *Godfrey v. Littell*, 1 Russ. & My. 59; *Attorney-general v. Stephens*, 6 De G. Mc. & G. 111. Indeed, it seems to be held in *Bishop of Ely v. Kenrick*, Bunb. 322, that unless the plaintiff's title is admitted by the defendant, relief cannot be awarded. But it was held otherwise in *Godfrey v. Littell*, 1 Russ. & My. 59, by Sir John Leach, master of the rolls, who said: "It appears, by the authorities which have been referred to, that, to sustain a bill of this nature, it is necessary that the plaintiff establish a clear legal title to some land in the possession of the defendant; and according to the case in *Bunbury Bishop of Ely v. Kenrick*, Bunb. 322, the court will not direct an issue to try the title, if it be left in doubt upon the evidence in the cause. It has been argued that the title of the plaintiff must appear by the admissions of the defendant, and that it is not enough that it be established to the satisfaction of the court by the evidence in the cause. That proposition is not countenanced either by authority or by principle, and is manifestly untenable; for, if such were the rule, there never could be a decree for the plaintiff in a suit of this nature, as no defendant would admit the plaintiff's title." And this doctrine was approved by Lord Brougham, in *S. C.*, 2 Russ. & My. 633.

Having thus considered the general limitations of this branch of equity jurisdiction, it remains now to mention some of the instances in which the jurisdiction has been exercised.

DOCTRINE APPLIED BETWEEN LORD AND TENANT.—The jurisdiction of equity to settle a question of confused or obscure boundaries, is more frequently exercised in cases where there is some peculiar duty resting on the defendant to preserve the boundaries, than in any other. Hence, if there is between the parties the relation of lord and tenant, and the boundaries have become confused through the act or misconduct of the tenant or those through whom he claims, this is uniformly regarded as a sufficient equity to uphold the jurisdiction: 1 Story's Eq. Jur., sec. 620; *White and Tudor's note to Wake v. Conyers*, 2 Lea. Cas. in Eq. 441; *Boreman v. Yeat*, 1 Cas. in Ch. 145; *Glyn v. Scawen*, Finch, 239; *Boteler v. Spelman*, Id. 96; *Spyer v. Spyer*, Nela. 14; *Willis v. Parkinson*, 2 Meriv. 507; *Attorney-general v. Bowyer*, 5 Ves. 300; *Aston v. Lord Exeter*, 6 Id. 293; *Grierson v. Eyre*, 9 Id. 345; *Reresby v. Farrer*, 2 Vern. 414; *Attorney-general v. Fullerton*, 2 Ves. & B. 263. "Certainly," says Lord Chancellor Eldon, in *Aston v. Lord Exeter*, 6 Ves. 293, "it is a duty upon the tenant to keep the boundaries; and this court will aid the reversioner to distinguish them, and even will give him as much land if they can not be distinguished." The same learned chancellor gave this subject a more extended examination in *Attorney-general v. Fullerton*, 2 Ves. & B. 263, where he thus stated the doctrine: "It has long been settled, and that law is not now to be unhinged, that a tenant contracts, among other obligations resulting from that relation, to keep distinct from his own property, during his tenancy, and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own. This is, therefore, a common equity; that a tenant having put his landlord's property and his own together, for his own convenience, in order to make the most of it during his tenancy, is bound at the end of the term to render up specifically the land-

lord's land; and, if he can not, that a commission shall issue from a court of equity to inquire what were the lands of the landlord; the court taking care, to the intent that the tenant may discharge his obligation, to do what is right as to the possession in the mean time; and if the tenant has so confounded the boundaries, subdividing the land by hedges and stones, and destroying the metes and bounds, so that the landlord's land can not be ascertained, the court will inquire what was the value of the landlord's estate, valued fairly, but to the utmost, as against that tenant, who has himself destroyed the possibility of the landlord's having his own."

And the same principle applies whatever may be the duration of the tenancy, whether it be for life or years, or at will: *Attorney-general v. Stephens*, 6 Do G., Mc. & G. 111. In that case Lord Chancellor Cranworth gave a very satisfactory exposition of the principles upon which this remedy against a tenant is allowed, placing it upon the ground of a breach of trust. In the course of his opinion he says: "The relief thus asked is founded on misconduct analogous to a breach of trust on the part of the defendant, or those to whom he has succeeded. Where a tenant of land for life, or for years, or at will, has land of his own adjoining to that which he so holds as tenant, it is his duty to keep the boundaries between them clear and distinct; so that, at the expiration of the tenancy, the reversioner or remainder-man may be able without difficulty to resume possession of what belongs to him; and if the person having such partial interest neglects this duty, and suffers the boundaries to be confused, so that the reversioner or remainder-man can not tell to what land he is entitled, this court will give relief, by compelling the person who has occasioned the difficulty to make good, out of what may be considered to be in the nature of a common fund, that portion of it which belongs to another. He has, by his neglect of duty, made it impossible to ascertain the particulars of which that portion consists, and this court then steps in, and compels him to make good an equivalent, as near as may be, out of that which clearly includes what, but for his default, might have been taken from him by legal proceedings. This relief is given, not only against the party guilty of the neglect, but also against all those who claim under him, either as volunteers, or as purchasers with notice."

Similar relief is granted against a copyholder who has confounded the copyhold land with his other land, so that it can not be distinguished: *Duke of Leeds v. Earl of Strafford*, 4 Ves. 180; *Wintle v. Carpenter*, Finch, 462; *Davenport v. Bromley*, Id. 17; *Clayton v. Cookes*, 2 Atk. 449. And where a decree has been made between the lord and tenants of a manor, establishing the boundaries of copyhold lands, and reducing to certainty arbitrary fines previously taken of copyholders, it will be confirmed against a subsequent purchaser of the manor: *Neudows v. Patherick*, Finch, 154. A commission will be awarded against a tenant, also, where, by reason of the confusion of boundaries between his own land and that of the landlord, the landlord is disabled from distraining for rent: *Mitf. Eq. Pl.* 117; *Bouverie v. Prentice*, 1 Bro. C. C. 200; *Duke of Leeds v. Powell*, 1 Ves. sen. 171. So it seems even where the confusion of boundaries is the result of accident or lapse of time, if the landlord can not distrain, he may file a bill in equity to obtain payment of the rent, and ascertain the boundaries: *Mayor of Basingstoke v. Lord Bolton*, 1 Drew. 270.

It is not necessary, in order to give a landlord an equity against his tenant in case of a confusion of boundaries, that such confusion should have been occasioned by the tenant himself. It is enough, as was held by Lord Chancellor Cranworth, in *Attorney-General v. Stephens*, 6 Do G., Mc. & G. 111, if

the tenant claims under him who caused the confusion. So, even though it may have been done centuries before the defendant's coming into possession: *Godfrey v. Little*, 1 Russ. & My. 59, S. C., 2 Id. 630. But it is otherwise where the confusion of boundaries was caused by a former occupant of the premises, between whom and the defendant there is no privity or connection whatever: *Speer v. Crawler*, 2 Meriv. 417; *O'Hara v. Strange*, 11 Irish Eq. 262; *Ireland v. Wilson*, 1 Irish Ch. 623. But it seems to be no obstacle to the relief that both the plaintiff and the defendant claim through the person by whose fault or negligence the boundaries became confused: *Hicks v. Hastings*, 3 Kay & J. 701.

It is to be noted, however, in this connection, that even where relief is sought in a case of this sort against a tenant, it will not be granted if there is a remedy at law: *North v. Strafford*, 3 P. Wms. 701.

OTHER CASES WHERE CONFUSION CAUSED BY DEFENDANT.—It is not necessary that the relation of landlord and tenant should exist between the parties to warrant the interference of a court of equity in cases of this kind. Even where they claim adversely to each other, if the boundaries become confused through the fraud of the defendant, or through any misconduct on his part giving rise to an equity against him, and if there is no sufficient legal remedy, a court of chancery will take jurisdiction. Thus, where an owner of land conveyed to the plaintiff the right to erect a dam thereon and to carry water through a race or ditch across the land to the plaintiff's mill, and the defendant having purchased the land, destroyed the dam and ditch and plowed over them, so that their location could not be ascertained, a commission was granted to determine the site of such dam and ditch and the expense necessary to replace them: *Merriman v. Russell*, 2 Jones Eq. 470. So, in *De Feney v. Gallagher*, 20 N. J. Eq. (5 C. E. Gr.) 33, the defendant had threatened to take down or remove about ten inches of the plaintiff's dwelling, which the defendant claimed projected over on his land. This, it was held, would be a trespass irreparable at law, which should therefore be enjoined in equity. See note to *Jerome v. Ross*, 11 Am. Dec. 502. And in order to determine whether the injunction should be made perpetual, a commission was awarded to ascertain and settle the disputed boundary. Chancellor Zabriskie, in delivering his opinion, said: "Courts of equity have long entertained jurisdiction, in cases of confusion of boundaries, to establish lines; and although they never entertained a simple suit to fix boundaries between individuals where courts of law have jurisdiction, yet when the question is as here, connected with matters that require the interference of equity, they will, to prevent multiplicity of suits, entertain jurisdiction and settle the boundary: 1 Story's Eq. Jur., secs. 609, 621. The court, in this case, will ascertain the boundary to settle whether the complainant is entitled to the continuance of its protection by injunction."

So in *Marquis of Bute v. Glamorganshire Co.*, 1 Phil. Ch. 684, Lord Chancellor Lyndhurst held that the facts stated in the bill would warrant the issuance of a commission, it being alleged that the defendants, a canal company, had gradually encroached upon and obliterated the plaintiff's boundary, and had granted privileges to a number of persons to erect wharves along the line, so that it would require a multiplicity of actions to settle the matter at law. The learned chancellor said: "I think the allegations in this bill present a case, which, if substantiated by evidence, would entitle the plaintiff to a commission; the bill states a system of gradual encroachment on the part of the defendants, filling up the ditch and obliterating the boundaries; and, further, the necessity, if this court should not interfere, of bringing a

number of actions against the different parties, in order to fix the boundaries and establish the plaintiff's right." Indeed the prevention of a multiplicity of suits has been frequently said to be a sufficient equity upon which to ground a commission to determine a question of confused boundaries: 1 Story's Eq. Jur., sec. 621; *Wake v. Conyers*, 1 Eden, 331; S. C., 1 Cox Ch. 360; 2 Lea. Cas. in Eq. 433; *Waring v. Hotham*, 1 Bro. C. C. 40. But in such cases, as was said by Lord Keeper Henley, in *Wake v. Conyers*, *supra*, a resort to equity is not to be encouraged unless it will certainly have the effect of suppressing litigation. From what was there said by him, and also from the opinions of the majority of the judges in the principal case, it is clear that the prevention of a multiplicity of suits is a very specious equity, which is often as pernicious in its consequences as the evil which it attempts to remedy. Its most useful office is as an incidental or consequential equity, where the court has got jurisdiction by some other equity, or in cases where the plaintiff seeks to be quieted in his possession after having established his right at law: *Doggett v. Hart*, 5 Fla. 215; see *Mayor of York v. Pilkington*, 1 Atk. 282; *Whaley v. Dawson*, 2 Sch. & Lef. 370; *Commissioners v. Glasse*, 41 L. J. Ch. 409 (N. S.).

As fraud is a recognized head of original jurisdiction in equity, it will be a sufficient ground for a court of chancery to interpose in a case of confusion of boundaries, if the confusion was occasioned by the fraud of the defendant: 1 Story's Eq. Jur., sec. 619; *Rouse v. Barker*, 4 Bro. P. C. 660 (Toml. ed.), cited in *Atkins v. Hatton*, 2 Anst. 396. It seems also that where lands are allotted to several distinct offices, and the offices ultimately come to the possession of one person, who confuses the boundaries of such lands, a court of chancery may take jurisdiction: *Kennedy v. Trott*, 6 Moore P. C. C. 449.

A statutory method of fixing a lost or disputed boundary by a "commission of surveyors," is provided in Illinois: *Townsend v. Radcliffe*, 63 Ill. 2. And it has been held that acquiescence of the parties in a particular line may be accepted as evidence of an intention to establish that as the boundary: *Thomas v. Sayle*, Id. 363. An agreement to establish a boundary has been held not to be a contract for an interest in land, and therefore such an agreement, though resting in parol, may be specifically enforced in equity: *Jamison v. Pettit*, 6 Bush. 669.

THE PRINCIPAL CASE IS CITED in subsequent decisions in Virginia on the following points: That omission to demur or plead want of jurisdiction will not give a court of equity jurisdiction to try a question of legal title: *Hudson v. Kline*, 9 Gratt. 386; that partition will not be granted where the plaintiff's title is doubtful, but he will be sent to a court of law to establish it: *Currier v. Spraul*, 10 Gratt. 147; that a party cannot apply to a court of equity to cancel a deed in his own favor: *Burners v. Keras*, 24 Gratt. 52.

HAYS v. WOOD.

[4 RANDOLPH, 272.]

WHERE TWO PURCHASE LAND JOINTLY, one of them advancing most of the purchase-money, under an agreement that if the land is sold, he is to have half the proceeds, or that he is to be repaid his advances and that the other may keep the land, and the latter takes the title in his own name, the former has a lien on the land for his advances.

EQUITY HAS JURISDICTION TO MAKE A PERSONAL DECREE in such a case, if the party does not ask that the land be subjected to the payment of the money.

APPEAL from the Staunton chancery court. The facts are stated in the opinion. The commissioner to whom the accounts between the parties were referred reported a balance due the plaintiff of four hundred and ninety-two dollars and fifteen cents, and interest; which report was affirmed and a personal decree rendered against the defendant for the amount, and the chancellor dismissed so much of the bill as asked a conveyance of a moiety of the land. The defendant appealed.

Leigh, for the appellant.

No counsel *contra*.

By Court, COALTER, J. Richard Wood, the appellee, and David Hays, the appellant, on the ninth day of October, 1815, purchased a tract of land from John Wood, for the consideration of four thousand dollars, payable as mentioned in the articles of agreement entered into between them on that day.

The bill alleges that the appellee had paid more than his moiety of the purchase-money, but that the appellant had received a title for the whole land. He therefore prays that the appellant may be decreed to repay the surplus and convey the moiety of the land. The answer alleges that the appellant, in 1815, made a verbal agreement to purchase the land of John Wood on his own account, but finding that he was unable to furnish all the property, paper, etc., necessary to make the first payment, and wanting some one to be responsible with him for the deferred payments, he entered into a verbal agreement with the appellee that he should aid him; and if the appellant could sell the land in a short time, the appellee should have one half of the profits, and if not, that he would pay him back his advances and keep the land; and in consequence of this, the written agreement aforesaid was entered into; and, as a better security for his performance, the agreement was to be deposited in the hands of Captain John Field; that the appellee did make certain advances towards the purchase, etc., but afterwards agreed, that if the appellant would pay him the amount which he had advanced, he would give up all claim to the land, which he agreed to, and paid various sums to him and orders he drew on him, etc., so as fully to reimburse his advances; that the appellee is in his debt on other accounts, etc. He admits that he obtained a conveyance for the whole tract, but denies that

it was fraudulently obtained, as charged in the bill; and should the court direct an account, he prays that the balance due him may be decreed, etc.

Taking it that these verbal agreements could have been proved and were proved, which is not admitted, the appellee would have been entitled to a lien on the land for the purchase-money advanced by him and not repaid by the appellant; and, in amending the bill according to this statement, the court clearly would have had jurisdiction to settle the accounts and decree payment, etc. But, without amending the bill so as to subject the land as aforesaid (which the appellee had a right to do, admitting that the statements in the answer are true), the parties consent that the accounts should be taken, and, a balance appearing due from the appellant, a personal decree is rendered against him for that balance. This it was competent for them to do, and this personal decree alone, when it might have been made to extend to the land, is beneficial to the appellant, and ought not to oust the court of equity of its legitimate jurisdiction in this case.

On this ground, I perceive no error in the decree so far as it regards the jurisdiction of the court.

But it is said that the exception by the appellant to the commissioners' report ought to have been sustained. I have examined the accounts with considerable attention, and am not satisfied that the court erred in this respect. I think, therefore, that the decree ought to be affirmed.

Decree affirmed.

BROOKE, P.J., and CABELL, J., absent.

GARLAND v. RIVES.

[4 RANDOLPH, 282.]

A CONVEYANCE TO SECURE A JUST DEBT WILL BE FRAUDULENT and void if it contain provisions to delay, hinder or defraud other creditors.

GRANTEE IN SUCH CONVEYANCE, HAVING NOTICE of the fraudulent provisions contained in it, is not a *bona fide* purchaser, notwithstanding the fact that his only motive was to secure the payment of his own debt, and that such fraudulent provisions were forced upon him as the only means of obtaining payment.

A BONA FIDE PURCHASER, without notice of any fraudulent design, will be protected under the statute of frauds.

TO VITIATE A CONVEYANCE under the statute, there must be a fraudulent design in the grantor and notice of it in the grantee.

CONCURRENT JURISDICTION IN CASE OF ACTUAL FRAUD.—In cases of actual fraud, equity has concurrent jurisdiction with the courts of law and, following the law, will give relief to the same extent. Hence, a conveyance tainted with actual fraud, of which the grantees had notice, will be set aside *in toto* in equity at the suit of a creditor.

THE MAXIM THAT HE WHO SEEKS EQUITY must do equity applies only to equities between the parties, and not to an equity between the plaintiff and a third person.

JUDGMENT AS EVIDENCE IN EQUITY.—Where a judgment-creditor comes into equity to enforce his judgment, such judgment is *prima facie* evidence, as against strangers claiming under the debtor, that he is a debtor, and, to impeach it, they must show fraud or that a full defense was not made, or produce new proof that the debt is not due.

PURCHASER PENDING A SUIT for the fraudulent purpose of defeating the object of it, is bound by the judgment rendered, equally with the debtor.

APPEAL from the Staunton chancery court. The opinion states the case.

Randolph, Call, Leigh and Stanard, for the appellant.

Johnson, for the appellee.

GREEN, J. The original bill in this case was filed by the appellee, a creditor of Lewis Nicholas, for the purpose of setting aside a conveyance of land, made by the debtor to John H. Coleman; another made to Charles Wingfield, and the said Coleman; and also a transfer of personal property, made by Nicholas to Wingfield and Coleman; and a conveyance of land, made by the latter to Edward Garland, as being fraudulent and void as to him. A chronological review of the transactions brought in question, will best explain their nature.

On the twelfth of November, 1818, Wilson Cary Nicholas purchased of the appellee a sterling bill of exchange for three thousand pounds, in consideration of which, he gave him his note, indorsed by Lewis Nicholas, for sixteen thousand and forty-six dollars, payable on the first of January, 1820, with interest from the first of December, 1818. A suit was instituted on this note against Wilson C. Nicholas and Lewis Nicholas, in February, 1820. The defendants in June, 1820, pleaded severally, and rested their defense upon the ground that the transaction between Wilson C. Nicholas and Rives was usurious. Judgment was rendered for the plaintiff against Lewis Nicholas, in August, 1821; Wilson C. Nicholas having departed this life during the pendency of the suit, Lewis Nicholas was taken upon a *ca. sa.* issued upon this judgment, took the oath of an insolvent debtor on the twenty-first of Au-

gust, 1821, and was discharged. In his schedule, he stated that he had "no property of any description whatsoever."

Pending this suit, and on the sixteenth of May, 1820, John H. Coleman intermarried with a daughter of Lewis Nicholas; and on the first day of June the latter conveyed to the former three hundred and eighty-four and one half acres of land, part of a larger tract, on which Lewis Nicholas resided, and six slaves, professedly in consideration of an agreement made between them, before and in consideration of the marriage. This deed was recorded in November, 1820, and is one of the deeds impeached.

Lewis Nicholas being bound as indorser for a debt of six thousand nine hundred and ninety-one dollars and eighty-four cents, due from Wilson C. Nicholas to the Farmers' bank of Virginia, on the ninth of August, 1820, conveyed twenty-two negroes in trust, to secure the payment of this debt to the bank, on the first of June, 1827, with interest thereon, payable annually from the twenty-seventh of July, 1820. This deed was duly recorded, and is not questioned.

Edward Garland also held a negotiable note of Wilson C. Nicholas, indorsed by Lewis Nicholas, dated July 23, 1819, payable thirty days after date, for thirteen thousand eight hundred dollars. These three debts, together with one due to Saunders, upon a note of Wilson C. Nicholas, indorsed by Lewis Nicholas, for about seven thousand dollars, and which was in suit against Lewis Nicholas, before the arrangements hereafter mentioned were entered into, were the only debts of any consequence due by Lewis Nicholas. And he states that he never voluntarily engaged for these debts, except that to the bank; that Wilson C. Nicholas being intrusted by him with his indorsements in blank, for the purpose of continuing the note indorsed by him at bank, had filled them up, and delivered them to Rives, Garland and Saunders, without his knowledge or consent.

Garland, having in vain endeavored to get a security from Wilson C. Nicholas for his debt, forwarded the note which he held to an attorney (Mr. Dyer), with instructions to bring suit upon it, expressing at the same time a wish to have the debt secured without litigation, and authorizing the attorney to make any arrangements to that effect. A writ was ordered on this note on the twenty-third of December, 1820, but never issued in consequence of the arrangement afterwards made. In pursuance of Garland's instructions, his attorney entered into negotiations with Lewis Nicholas, and the latter expressed a

willingness to secure the debt; but before anything was done, it was proposed by Wingfield and Coleman, the sons-in-law of Lewis Nicholas, that if Garland would make a considerable discount (the amount of which was communicated to Garland by his attorney) they would purchase his debt, and give their own bond for the amount to be paid to him. Garland's attorney communicated this proposition to him, and informed him "that it was understood that Lewis Nicholas intended to sell all his property at public auction, and was willing to secure Wingfield and Coleman as the owners of Garland's debt; and it was also understood that Wingfield and Coleman intended to bid at the sale to the amount of said debt; and it was further proposed by Wingfield and Coleman, more effectually to secure the amount to be paid to Garland, by incumbering for that purpose any property which they might purchase at the sale."

The attorney was unwilling to accede to the terms proposed without Garland's sanction in person, and wrote to him requesting him to go to Albemarle, that he might be consulted on the subject. Garland went to Albemarle, and after much hesitation on account of the heavy discount required, at length, fearing that Rives might get a priority over him and that he might lose his debt entirely, "he determined to accede to the proposition made by Wingfield and Coleman, and accordingly passed his debt to them and took their bond for thirteen thousand dollars," payable to him ten years after date, without interest; "and after the transfer was made, Lewis Nicholas executed a deed of trust conveying certain land, slaves, and other personal property to secure the debt so transferred to Wingfield and Coleman." These statements are taken from Garland's answer, and correspond with the answers of the other parties.

These arrangements were made on the eighteenth day of January, 1821. That is stated to be the date of the bond to Garland for thirteen thousand dollars, said to be given by Wingfield and Coleman in their deed to trustees for Garland of the fifteenth of February, 1821, hereafter to be noticed; and that is the date of the deed of trust given by Lewis Nicholas to trustees for Wingfield and Coleman, spoken of in Garland's answer. Garland was privy to the terms of this last mentioned deed, as was Dyer, his attorney. Garland's answer admits the first, and Dyer, with Harris, the attorney of Lewis Nicholas and Wingfield and Coleman, are subscribing witnesses to the deed. The original deed exhibited by Wingfield and Coleman is here by *subpoena duces tecum*, and it appears to me by in-

spection, that Dyer wrote about one half of the deed, from the beginning down to the description of the land conveyed, and Harris the remainder.

The particulars of this deed, although it is not recorded, and can not be relied upon as giving any title, are material. The original deed, as it was executed, is between Lewis Nicholas, of the one part, Wingfield and Coleman of the second part, and T. J. Randolph and C. Cocke of the third part; and recites: "That the said Lewis Nicholas is justly indebted to Edward Garland, as indorser of a note drawn by Wilson C. Nicholas, bearing date the twenty-third day of July, 1819, negotiable and payable thirty days after its date, at the bank of Virginia, for the sum of thirteen thousand eight hundred dollars; and which said note the said C. Wingfield and J. H. Coleman have fully discharged and paid to the said Edward Garland, on the part of the said Lewis Nicholas, and for which the said Lewis Nicholas is desirous to secure and save them harmless." Since the execution of the deed the words, "on the part of the said Lewis Nicholas," and the word "for," and the words "and save," and the word "harmless," have been dashed out with a pen, but so as to leave them perfectly legible; and the words, "the payment of," are interlined after the words "to the said Edward Garland." The word "to" has been inserted before the word "them;" so as to make the deed read as it is copied into the record. "And which note the said Wingfield and Coleman have fully discharged and paid to the said Edward Garland, and the payment of which the said Lewis Nicholas is desirous to secure to them, the said Coleman and Wingfield." No note is made at the foot of the deed of these interlineations and erasures, as made before the signing or otherwise; whilst other interlineations in the deed are noted as made before signing, and the witnesses subscribe under this note; a clear proof that the erasures and interlineations above specified were made after the deed was executed.

Neither Nicholas's note nor Wingfield and Coleman's bond are exhibited. We have not the written evidence which exists as to what passed between Garland and Wingfield and Coleman on this occasion. If we had this evidence we might see whether Garland indorsed the note to Wingfield and Coleman; and if he did, whether it was specially indorsed without recourse to him, or whether their bond is unconditional or otherwise, I doubt whether the note was really sold to Wingfield and Coleman. The deed, in its original form, declared that they

had paid it to Garland, on the part of Lewis Nicholas; and that it was intended only to secure and save them harmless; a stipulation perfectly proper, if they gave their bond for thirteen thousand dollars, payable in ten years without interest; not for the purchase of the debt for themselves, but in satisfaction of the debt on the part of Lewis Nicholas; in which case they could only have claimed an indemnity against this responsibility. Such a stipulation would have been in no manner adapted to the case if they had purchased the debt for themselves. However this may be, I shall consider the case as if the debt were really sold and transferred, as stated by the parties.

The deed proceeds, in consideration of one dollar paid by Wingfield and Coleman to Lewis Nicholas, to convey to them the lands on which he resided, containing two thousand one hundred acres, more or less; five negroes, by name (this was the residue of Lewis Nicholas's land and negroes, after taking out the land and negroes conveyed to Coleman, and the negroes conveyed in trust for securing the debt to the bank); and, also, his equity of redemption in the slaves conveyed to secure the debt to the bank; his stock of horses, cattle, hogs, and sheep; all his plantation utensils, household and kitchen furniture; all the meat on hand; all his beds, bedclothes, and furniture of every description; a four-wheel carriage, a wagon and two carts; and the crops of grain on hand, and what may be made hereafter; to have and to hold to Randolph and Cocke, in use and trust for Wingfield and Coleman and their heirs forever; with authority to Randolph and Cocke to sell the whole of the land and other property, for cash, after ten days' notice of the time and place of sale, by advertising the same at the door of the court-house of Albermarle county, and out of the proceeds of sale, after paying expenses, to pay the said note, interest and costs, and the balance, if any, to Lewis Nicholas.

In the Enquirer of January 25, 1821, an advertisement appeared, under the date of January 20, and with the signature of Lewis Nicholas, notifying that on the fifteenth of February, 1821, he would sell, on the premises, for cash or on short credit, as he might choose on the day of sale, his tract of land of two thousand one hundred and forty-one acres, his horses, cattle, household and kitchen furniture; also, all the other property which he owned. No slaves are mentioned in this advertisement, although Lewis Nicholas owned, and professed to sell on the day of sale the slaves mentioned in the deed of trust of Jan-

uary 18, besides those conveyed in trust to secure the bank debt and those before conveyed to Coleman.

On the fifteenth of February, 1821, the sale was made, professedly for cash, and Wingfield and Coleman were the purchasers of all the property sold that day, save one horse purchased by Omohundro; and the next day they purchased the residue of the personal property, down to a set of razors, old case and brush, whether at public or private sale does not appear; and Lewis Nicholas gave them a certificate under his hand and seal, at the foot of a schedule of the articles professed to be sold, that he claimed no right or title in any of the property, nor any control over it. This is dated February 26, 1821. The amount of the sales to Wingfield and Coleman was twelve thousand nine hundred forty-six dollars and thirty cents. There was no competition in the biddings, except in the purchase of the horse by Omohundro, and Wingfield and Coleman bid against each other for the land. The general impression amongst those who attended the sale was, that it was a mere contrivance to protect Lewis Nicholas's property from Rives's claim; and Wingfield and Coleman, who, as long as the amount of their purchases kept within the amount of their claim, had no motive to bid low, so that their claim covered the whole property, might obviously have bid what they pleased; and, indeed, without frustrating their object, bid against each other. Accordingly, the property sold for little more than half its cash value, if, indeed, so much as that.

To see this sacrifice of the personal property, it is only necessary to inspect the list of sales, and compare it, as to some of the items, with the evidence. Oats in the straw sold at five cents a hundred, and fodder at six and a quarter cents a hundred. This very property, for which Wingfield and Coleman gave two thousand nine hundred and forty-six dollars and thirty cents, sold afterwards, under the decree of the court, for five thousand five hundred and seventy-six dollars and sixty-nine cents, cash. This is the amount of the marshal's sales, after deducting the sales of tobacco and wheat. The sale by the marshal was on the twenty-first of August, when there was a much smaller quantity of corn on hand than at the time of the sale by Lewis Nicholas, on the fifteenth of February. The price of the land, ten thousand dollars, was inadequate in the same ratio. The whole tract was sold together. I think that the evidence, consisting of the opinions of witnesses, shows satisfactorily that the land was then worth, in cash, at least eight dollars per acre,

which would amount to upwards of seventeen thousand dollars, and upon the usual credits of one, two and three years, at least ten dollars per acre, which would amount to upwards of twenty-one thousand dollars; but there is more decisive evidence of its value than the opinions of the witnesses. Jesse Jopling testifies, that pending Rives's suit, Lewis Nicholas applied to him to be his security upon an appeal, if the suit went against him, and offered to give him a deed of trust upon his land, containing, as he said, about two thousand acres, which Lewis Nicholas considered as a good indemnity against the debt, interest, damages and costs, which could not have amounted to less than twenty thousand dollars, in which opinion Jopling concurred, and agreed to become his surety, if the appeal was taken; and on the day that Wingfield and Coleman purchased the land, they pledged it, and Garland accepted it as an ample security for thirteen thousand dollars. These circumstances show sufficiently the opinions of the parties concerned, as to the value of the land.

The negroes conveyed to Coleman in June, 1820, were exposed to sale in mass, on this occasion, as the property of Lewis Nicholas, with Coleman's consent, upon the advice of counsel that he had no title, and the land conveyed to him was conveyed with the residue of the tract to him and Wingfield, as if sold to them at this sale.

On the fifteenth of February, 1821, the land was conveyed by Lewis Nicholas to Wingfield and Coleman, and on the same day, they conveyed the two thousand one hundred and forty-one acres (the residue of the tract, excepting what had been conveyed in June, 1820, to Coleman) to Coles and Cocke in trust, to secure the payment of their bond to Garland for thirteen thousand dollars, dated January 18, 1821, and payable ten years after date, without interest. These deeds were acknowledged before magistrates, and the privy examination of the wives of Wingfield and Coleman, taken on the same day and recorded on the next day. In anticipation of the results of this sale, and according to the previous arrangements between the parties, these deeds were prepared before the day of the sale, and arrangements made with persons who had agreed to act as trustees in the deed to secure Garland's debt, and the attorney for Garland attended on the day of sale to have the deed executed. This appears from the deed of trust, and the answer of Coles, one of the trustees. After the deed was written, certain interlineations were noted, as made before signing, and at the foot

of this note, the usual clause of attestation was written, and below this clause these words are written: "The names of the trustees also changed before signing." The time and reason of this change appear from Coles' answer. He says, "that when the sale had nearly closed, he was applied to by one of the persons who seemed most active, and, he presumes, was one of the legal advisers present, to become trustee to secure the payment of the bond due from Wingfield and Coleman to Garland, by a lien on the land that was late Nicholas's; that he declined, acting under the general impression that he wished to have no part in the transactions of the day; but, being strongly urged, on the ground that one of the parties that had consented to act, had, by some means, been prevented attending, and that they would find some difficulty in getting a fit person as his substitute; losing sight of the original impression, and being solely actuated by a wish to serve neighbors, he became a party." The other trustee, Cocke, states that the counsel on both sides attended the sale, and that his confidence in them induced him to agree to act as trustee.

Wingfield and Coleman filed a cross-bill, impeaching Rives's claim as usurious. The court of chancery decreed all the conveyances to be fraudulent and void as to Rives, and that his judgment was valid and unimpeachable; and Garland alone appealed. The only question, therefore, for this court to decide is, whether Garland's lien be valid or void as it respects Rives; whether Rives's judgment can be impeached in this way; and if it can, whether it is infected with usury, or not.

As to the conveyance in consideration of a pretended marriage contract, it may be observed that there is not a shadow of doubt as to the propriety of the decree. There was no such contract, nor does Coleman, in his answer, allege that there was. The whole case, in truth, was that Lewis Nicholas had frequently, in conversation with his neighbors, said that he should make his children equal, and that the law made the best will. Coleman had heard of these declarations, and Lewis Nicholas had advanced his daughter, Mrs. Wingfield, upon her marriage.

It is impossible to look at the particulars of these transactions, without a conviction amounting to absolute certainty, that on the part of Wingfield and Coleman, and Lewis Nicholas, the motive under which it is attempted to cover and protect these transactions (the preferring a just creditor, and securing the payment of a just debt), had not the weight of a feather with them; that their sole motive for dealing with that debt as

they did, was to enable them by means of it to prevent Rives, and perhaps Saunders, who were prosecuting their suits, from getting satisfaction to the amount of a cent out of the property of Lewis Nicholas; and at the same time to secure to Wingfield and Coleman, the sons-in-law of Nicholas, his whole property, except the slaves pledged to the bank, at about half its value, upon a credit of ten years, without interest; and, indeed, without in all probability paying ultimately one cent out of their own funds. For having a right to the twenty-two valuable laboring slaves pledged to the bank for upwards of six years, charged only with the payment of the interest on the bank debt of four hundred and twenty dollars per annum, they might reasonably expect to raise the thirteen thousand dollars, or very nearly the whole, from the profits of the property in the course of the ten years. Wingfield and Coleman could not possibly have any motive for preferring the debt to Garland, independently of the views which I have attributed to them. They were under no legal or moral obligation to pay it, or to take any care about its payment. They were not *bona fide* purchasers, nor creditors seeking to avoid a loss. The question was not with them *de damno evitando*, but emphatically *de lucro capiendo*. Nicholas, although under a legal, was under no moral obligation to pay this debt. He was only a surety, and that not voluntarily. The obligation was imposed on him by the fraudulent use of the note to another purpose than that for which he indorsed it. Garland was willing to have given Nicholas the same terms which he gave to Wingfield and Coleman, and to have taken a direct and fair lien upon his property. To have acceded to those terms would have looked like a preference of one creditor to another; and that upon reasonable and intelligible motives. But the rejection of the great advantages of these terms, and preferring to subject this property to a cash sale for the whole amount of the debt and interest, giving to his sons-in-law the advantage of the discount and credit, instead of taking it himself; the struggling to reduce Garland to the lowest terms, not for the benefit of Nicholas, but of his sons-in-law; and the whole dealing of the parties in respect to this debt, and the use made of it, show that the preferring of Garland's debt did not enter into the motives of these parties; and that the only motives which actuated them, were those before stated. As to these parties, it is a case of pure and unmixed fraud. If we were called upon, in any other character than that in which we are acting, to judge of their conduct, great

allowances might very properly be made. A highly respectable man, advanced in years, in affluent circumstances, having a family brought up in ease, is suddenly involved in utter ruin, not by his own misconduct, but as the surety of a friend who had betrayed his confidence, and who, he believed, had been forced by his necessities into the hands of usurers, resorts to means advised as legal by respectable but mistaken counsel, to save a remnant of his property; and the members of his family unite with him in those measures. We can not see such a case without great pain, nor condemn the actors with severity. But such considerations can not enter into any system of laws, nor be the foundation of any right, legal or equitable.

As to Garland I have not a shadow of doubt that, as he states in his answer, his only motive for taking the part which he did in these transactions, was to secure as much of his debt as, by any means, he could under existing circumstances; and that he would have preferred a direct security from Lewis Nicholas, to the course which was taken, and which he yielded to from necessity, as the only means of securing anything, although he knew the purpose for which those arrangements were proposed by Lewis Nicholas and Wingfield and Coleman. When Lewis Nicholas declined to give a direct security, and Wingfield and Coleman made their propositions, a full outline of their scheme, and the use they intended to make of his debt, was communicated to him. If this did not, at the first blush, satisfy him that their design was to make a fraudulent use of it against Nicholas's creditors, he ought to have been convinced upon that point when he and his counsel, on the eighteenth of January, 1821, were apprised of the terms of the deed of that date, which provided for the sale of Nicholas's entire property for cash, upon ten days' notice, by advertisement at the courthouse door only, to indemnify Wingfield and Coleman to the amount of the whole debt, for giving their bond for a part of the debt, payable ten years after, without interest; and if that was not sufficient to apprise him of their real intentions, his agent and counsel had full notice of the true object of all these arrangements, when, on the fifteenth of February, the whole scheme was completely consummated. Garland, if not a participator in the fraud, had at least full notice of it; and if not in all its stages, yet certainly before the execution of the deed under which he claims.

It could hardly be contended in a court of law that this conveyance to Wingfield and Coleman was not fraudulent and void

as to the creditors of Lewis Nicholas. The statute of frauds avoids all conveyances contrived of covin, malice, fraud, collusion or guile, with intent or purpose to delay, hinder or defraud creditors; except in cases where, though the grantor has a fraudulent intent, the purchaser acts *bona fide*, and gives a valuable consideration. Without the *bona fides* on the part of the grantee, the valuable consideration has no effect in rescuing the transaction from the literal terms and spirit of the statute. If Wingfield and Coleman could be considered as *bona fide* creditors for thirteen thousand dollars, and had aimed only at securing or getting payment of the debt, they would have been protected by the proviso of the statute, no matter what had been the fraudulent intent of the grantor. But the moment they passed this line and mixed with this object that of delaying, hindering or defrauding creditors, any conveyance made in furtherance of this compound object was absolutely void, and they were left (as they were before they attempted the fraud) creditors without a security. "*Quod alias justum et bonum est, si per fraudem petatur, malum et injustum efficitur.*" One and the chief object with them, if not the sole motive for the part they acted in these transactions, was, by covin with Lewis Nicholas to delay, hinder and defraud all his creditors except Garland.

But it is insisted that Garland being a *bona fide* creditor, and having taken a security from Wingfield and Coleman on the property conveyed to them by Lewis Nicholas for the debt really due, he falls within the exception of the statute of frauds, being a *bona fide* purchaser for value; and that, although the conveyance to Wingfield and Coleman was fraudulent and void. The construction of this proviso has been much discussed, and many cases upon that point have been cited. A careful attention to the terms of the statute, and a comparison of it with the statutes of 13 and 27 Eliz. will, I think, without a particular examination of the authorities cited, satisfy us as to its true construction.

The statute of 13 Eliz., against fraudulent conveyances as to creditors, has this proviso: "That this act, nor anything therein contained, shall not extend to make void any estate or conveyance, etc., had, made, etc., or hereafter to be had, made, etc., which estate or interest is, or shall be, upon good consideration, and *bona fide* lawfully conveyed or assured to any person or persons, etc., not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion, as aforesaid."

The statute of 27 Eliz., for securing subsequent purchasers against conveyances intended to defraud them, had a proviso to the same effect as the above stated proviso of the 13 Eliz., except that the words in italics at the close of the proviso of the 13 Eliz., as above quoted, were omitted in the proviso of the 27 Eliz. The reason of this difference in the terms of the provisos of these statutes is obvious. If a conveyance were intended to defraud subsequent purchasers, that intent could not possibly be known to have existed until a sale was actually made by the vendor to a subsequent purchaser; and if a purchaser for valuable consideration procured a conveyance from the fraudulent grantee before any other made a purchase from the fraudulent grantor, then, at the time of the purchase from the fraudulent grantee, the purchaser could not only not have notice of any fraudulent intent in the original grantor, but could not do an injury to any one, as no one had an interest in the subject who could object to his purchase. Such a purchase for value would be *bona fide*, and the purchaser would be entitled against any subsequent grantee from the fraudulent grantor, although he had notice that the conveyance to his grantee was voluntary. This was a necessary provision; otherwise, all voluntary gifts would have been inalienable, at least during the life of the grantor, and such purchases from the fraudulent grantee have always been supported against subsequent purchasers from the fraudulent grantor. These are the expressions in the books, though it is clear that until the grantor sold to a purchaser neither he nor the grantee could be guilty of any fraud as to subsequent purchasers; and it might happen that there never would be such subsequent purchasers.

But as to fraudulent conveyances, to the prejudice of creditors, they were immediately void as to such creditors; and but for the proviso, the enacting clause might have avoided the deed made with intent to defraud creditors, although that intent was confined to the grantor only, and was not known to the grantee. I do not, however, think that this would have been the effect, even of the enacting clause alone. The expression "collusive," can apply only to cases in which both parties concurred in the fraudulent intent. However that might be, if the grantor and grantee had colluded to defraud creditors, the conveyance would be absolutely void as to creditors; and the fraudulent grantee could not, but for the proviso, have transferred any title to a *bona fide* purchaser from him. *Nemo potest transferre plus juris in alium quam ipse habet*, and

to guard against this consequence, was, I think, the chief object of the proviso. It provides for the validity of a conveyance to a *bona fide* purchaser for value, having no notice of the covin, fraud, collusion or guile; such covin or collusion of which the purchaser was to have no notice, must, if it existed, have been between the original grantor and grantee. In case of a voluntary grant, considered as fraudulent as to a subsequent purchaser because voluntary, the purchaser from the donee, having notice that the deed was voluntary, would not thereby have notice of a fraud, as there could exist no fraud until there was a subsequent purchaser, which might never happen; and the statute of the 27 Eliz. therefore dropped the expression in respect to purchasers without notice, found in the statute of 13 Eliz.

Notice to the purchaser from the fraudulent grantee of property conveyed with intent to defraud creditors was important. Such a purchase, with notice of the fraudulent intent, would be a fraud, because it would tend to assist the consummation of the fraud, in prejudice of the known existing rights of creditors, who, but for such purchase, would be enabled to reach the property fraudulently conveyed. It was for this reason that the proviso of the 13 Eliz. excluded from its benefit purchasers with notice of the fraud expressly; although the effect of the proviso would have been the same if this special provision, as to purchasers without notice, had been omitted. The former member of the proviso had only preserved the interests of *bona fide* purchasers for value; and a purchaser, with notice of the fraud, would not have been a *bona fide* purchaser, and so not within the proviso. This, I think, is the reason why the legislature of Virginia, in transferring the substance of the two English statutes into our statute of frauds and perjuries, has adopted the substance of the provisos of both the English statutes, omitting that part of the proviso of the 13 Eliz., which speaks of purchasers without notice as superfluous in the case of creditors, and improper in the case of subsequent purchasers. The proviso of our statute is in these words: "This act shall not extend to any estate or interest in any lands, etc., goods, etc., which shall be, on good consideration and *bona fide* lawfully conveyed or assured to any person or persons, bodies politic or corporate." The *bona fides* required by this proviso, to exempt the conveyance from the operation of the statute, seems, in its literal import, to be required from both the grantor and grantee; and this was insisted on, by the

counsel for the appellee, as the true construction of the statute. The same words were used in the statute of the 13 Eliz.; yet their generality was controlled by the subsequent words in respect to purchasers without notice; according to which the purchaser was protected, if he had not notice of the fraud of his own grantor; so that the *bona fides* was required only of the purchaser. And this last, I think, is the just construction of our statute, which dropped the explanatory words to be found in the English statute; because, as was before said, they had really no effect in case of a purchaser under a conveyance to defraud creditors, and were wholly inapplicable, if not improper, in respect to that provision of our statute taken from the 27 Eliz., in relation to conveyances intended to defraud purchasers.

Considering Garland, then, as he really was from the moment he assigned Lewis Nicholas's debt to Wingfield and Coleman, and took their bond, as no longer a creditor of Lewis Nicholas, but of Wingfield and Coleman, and as being a purchaser from them for the security of their debt to him, and as having, as he really had, full notice of the fraud and of the invalidity of their title, he could, upon general principles of equity, acquire no better right than they had; and, upon the terms of the statute, can not be protected as a *bona fide* purchaser. He stands, to all intents and purposes, in their shoes.

Suppose, however, that to avoid the consequences of Garland's claiming, as he does, as a purchaser from Wingfield and Coleman, for securing a debt due from them to him, with full knowledge that they had no title as against Nicholas's creditors, we were, as it is contended we ought, to consider him as still virtually a creditor of Nicholas, and virtually claiming as a purchaser from him for the security of a just debt, what would be the effect? Certainly no more favorable to Garland than if, on the eighteenth day of January (when all those indirect arrangements were made with his knowledge and, so far as he was concerned, with his assent and concurrence), a direct lien had been given by Nicholas to Garland instead of Wingfield and Coleman, with an agreement between the parties intended to have the very same consequences which the arrangements actually made were intended to produce and did effect. That agreement would have been this: That Garland should release a part of his debt and give a credit of ten years, without interest, for the payment of the balance; that notwithstanding this abatement and credit, he should take a deed of trust, falsely

representing the whole debt to be due and immediately payable, subjecting the whole of Nicholas's property, down to the last mouthful of meat and bread, to immediate sale for cash upon ten days' notice at the court-house door only; that, at this sale, Wingfield and Coleman should purchase to the nominal amount of the debt, and discharge the portion of the debt agreed to be paid at the end of ten years, without interest; that this sale should be made immediately, to avoid the effect of the lieu of Rives's judgment, expected to be rendered in the first week of the succeeding March; and suppose this agreement were carried into effect, the sale made, the whole property purchased by Wingfield and Coleman at about half its cash value, and that, in effect, upon a credit of ten years; and Garland to have retained the lien on the land given to him by Nicholas, claiming under it only the sum agreed to be paid at the end of the ten years. In that case, the parties would all have been, substantially, in the condition in which they now are; Nicholas without property; Wingfield and Coleman claiming all that was his, subject to a lien on the land for thirteen thousand dollars, payable in ten years without interest; and Garland claiming a lien for the same debt and upon the same property as he now claims; with this only difference, that he would, in that case, claim under a deed from Nicholas, who had a title to convey, instead of claiming under Wingfield and Coleman, who have no title and could convey none to him. In such a case, the fraud of Nicholas and Wingfield and Coleman would have been just as palpable, and no more so, than it is in the case which has occurred; and Garland would not only have had the same notice of, but would have been a direct actor and participator in the fraud, a party to the covin and collusion, and could not be held to be a *bona fide* purchaser under the proviso of the statute. In any point of view in which I can consider this case, I see no ground upon which to hold that Garland has any legal title to the land in question.

It is, however, insisted that although Garland's trustees have no legal title which they could assert in a court of law against that vested in the sheriff by operation of law for the benefit of Rives or the lien of Rives's judgment and *ca. sa.* executed; yet, when the latter applies to a court of equity to aid in enforcing his legal rights, that court, upon its general principles, will not assist him further than by subjecting the property to Rives's claim after first satisfying Garland; and various classes of cases, supposed to be analogous to this, are referred to as illustrating the principles upon which a court of equity acts in such cases.

Before I examine the cases relied on as to this point, I premise that a court of equity, in all cases of actual fraud, has a concurrent jurisdiction with a court of law in remedying the fraud; and the remedy in equity is frequently more beneficial than at law, by means of its power to compel discovery and to cause fraudulent deeds and securities to be canceled or conveyances to be made, thus effectually putting an end to future litigation. In these cases of actual fraud equity follows the law and gives relief to the full extent to which a court of law could give relief: *Bennet v. Musgrove*, 2 Ves. sen. 51, a case which will be more particularly adverted to hereafter. The case under consideration is a case of actual fraud, and a strong case, in which, if Garland was not a party, he is a purchaser, with full notice from Wingfield and Coleman, who were the chief actors in the fraud; and I believe there is no exception to the rule of equity that a purchaser, with notice, stands in all respects in the shoes of his vendor. Rives, therefore, comes into a court of equity *ex debito justitiæ*, not appealing either to the favor or discretion of the court.

The invariable maxim of equity is that he who asks equity must do it. But this maxim is confined exclusively to the cases in which there is an equity between the parties, where, although the plaintiff is entitled to relief, he yet owes in conscience, though possibly not at law, a debt or duty to the defendant: Francis's Max. 1. In such cases relief is given, on the condition that the plaintiff does what in conscience he is bound to do to the defendant. An equity which any third person may have against the plaintiff can never be available, under this maxim, to the defendant.

In this case, neither Garland nor any other has any equity against Rives. Between two creditors engaged in a race of diligence in seeking a prior right to satisfaction out of the debtor's property there can be no equity. It is the *tabula in naufragio*; and he who obtains the prior legal right to satisfaction must prevail both at law and in equity. Where the equity is equal the law shall prevail.

To this maxim, that he who asks equity must do equity to the person from whom he asks it, are to be referred very many of the cases cited in the argument; as the cases of conveyances, bonds or judgments, or any other securities obtained by fraud; the cases of usury and annuities, in which the securities are void by statute. In such cases the plaintiff who asks the aid of a court of equity to relieve him against the vitious security:

is bound in equity and conscience to refund to the defendant, against whom he seeks relief, the real consideration which he has received from him; and it is upon that condition that relief is given.

Another class of cases relied upon is that which shows the extent of favor shown by a court of equity to creditors and *bona fide* purchasers without notice. These cases can not apply here. Garland is not a *bona fide* purchaser without notice; and although a creditor, so is Rives, both equally entitled to favor. There is no instance in which, as between creditors, he who has obtained the legal advantage has not prevailed.

The next class of cases insisted on is, that in which it has been held that a conveyance to several grantees may be void as to one, and good as to another; as in case of a marriage settlement, in which interests are given to those who are strangers to the consideration. The deed would be good as to the wife, and all coming within the considerations of the deed, but void as to all the rest, so far as creditors are concerned. The wife would be a *bona fide* purchaser for value; the strangers, mere volunteers. So, if a deed be made to secure a just debt, and the equity of redemption is reserved to a stranger, or to the family of the debtor; such a deed would be good as to the creditor, and void as to the reservation of the equity of redemption. In such cases the limitations to volunteers are void, not because there is any actual fraud, but because of the want of valuable consideration. The wife or creditor in such cases might not know that the grantee had any fraudulent intent; as he might not in fact, and they would have no concern in the disposition of the surplus interest of the grantor. But if the creditor, in such case, were to concur in any actual fraud, with intent to frustrate the rights of other creditors, as in lending his aid, in any way, to give color to any consideration falsely alleged, as the inducement to such a reservation of the equity of redemption, such his concurrence in the actual fraud of the grantor, would avoid his deed as to the creditors intended to be injured thereby.

To this class of cases may be referred those cases in which a husband stipulating to settle on his wife a just equivalent for her right of dower relinquished, with a view to defraud his creditors, settles property grossly exceeding in value the dower, in which case it has been held that the deed was valid so far as to secure the just equivalent, and void as to the surplus. In these cases the wife is held to be an innocent and *bona fide*

purchaser, to the extent of the value of the dower-right relinquished, and the fraud of the husband is not imputed to her. But if she were *sui juris*, and concurred in the fraud, the deed would be wholly void under the statute of frauds and perjuries.

It is lastly asserted that there is another class of cases in which, when it is doubtful whether the conveyance impeached was or was not founded in an actual fraud and collusion, to defeat or delay creditors, a court of equity will take a middle course and allow the deed to stand as a security for the money really due and give to the creditor the surplus; and a decision of Chancellor Kent, of New York, to this purpose, is cited: *Boyd v. Dunlap*, 1 Johns. Ch. 478. With great and habitual respect for the opinions of this distinguished judge, after examining the authorities which he cited, and those cited in the argument of this cause, I can not think that the principles asserted in that case are supported by precedents or sanctioned by any just reasoning.

If the conveyance is impeached upon the ground of actual fraud, intended to defeat or delay creditors, and the allegation of fraud is supported by proofs, the deed ought to be set aside *in toto*, and cannot stand as a security for any purpose of reimbursement or indemnity: *Sands v. Codwise*, 4 Johns. 536, 598, 599 [4 Am. Dec. 305]. If it be not supported by proof I can see no ground why the court should deprive the defendant of the benefit of an advantageous purchase, fairly made, so far as respects the creditors, upon the mere suspicion that a fraud upon creditors was intended.

There seems, however, to be another ground of equitable jurisdiction in favor of creditors, independent of the statute of frauds. When a purchaser takes advantage of the circumstances of a necessitous debtor to purchase his property at a great sacrifice, without any intention to frustrate the claims of his creditors, for the benefit of the debtor or his family, but for the sole purpose of benefiting the purchaser, and the circumstances are such as would induce a court of equity to relieve the vendor, in such a case a judgment-creditor, standing in the shoes of the debtor, independent of the statute of frauds, would be entitled to the same relief that the debtor would be entitled to, and could only be relieved upon the terms of paying out of the property, or otherwise, what the debtor justly owed, upon the principles before discussed. The relief is founded in these cases not on suspicion of fraud practiced with intent to injure creditors, but on the fraud practiced on the debtor himself to his own prejudice, and that satisfactorily proved.

The only cases cited in *Boyd v. Dunlap*, bearing upon this point, are *Herne v. Meeres*, 1 Vern. 465; 2 Bro. C. C. 177, note S. C.; and *Bennet v. Musgrove*, 2 Ves. 51. All the other cases, *How v. Weldon*, 2 Ves. 516; *Proof v. Hines*, Cas. Temp. Talb. 111; *Grove v. Watt*, 2 Sch. & Lef. 492; etc., are cases in which the grantor sought relief against his own contract, and was subjected to equitable terms. The case of *Barwell v. Ward*, 1 Atk. 260, was cited in the argument as bearing on the same point. These cases are all, as far as I am informed, that are to be found in the English books affecting this question.

The case of *Herne v. Meeres*, was decided in 1687; that of *Barwell v. Ward*, in 1744; and that of *Bennet v. Musgrove*, in 1750; and in the last case, I have no doubt that Lord Hardwicke, who decided *Barwell v. Ward*, intended to state distinctly the grounds upon which those cases were decided.

The case of *Bennet v. Musgrove*, was this: A bill by a judgment-creditor, who had an elegit executed, to set aside a fraudulent conveyance made by the debtor to the defendant. Two objections were taken; that a court of equity had no jurisdiction as the plaintiff had a remedy at law; and that there was not sufficient evidence of fraud. Lord Hardwicke said: "A plain case to give the plaintiff relief, which is, to be let into the benefit of that to which such a creditor is entitled, though a creditor at large is not. But, when a judgment is obtained affecting it from the time, and execution, he is entitled, because that affects the realty of the land, and this, whether it be one kind of fraudulent conveyance or another. For if it is by collusion, he clearly may; but, if it was obtained from his debtor himself, by fraud on the debtor, on or about the time he obtained his judgment and elegit, he might, as standing in the place of the debtor, come into this court to be relieved against that conveyance, and to have the same benefit of relief," as the debtor, I presume, might have had. The lord chancellor proceeded to declare, that the court had jurisdiction in a case of actual fraud, whether the plaintiff could recover, or not, at law. And notwithstanding the consideration specified in the deed of fifty pounds, a debt due to Musgrove, he set aside the deed, so far as it interfered with the plaintiff's right, under his elegit, the utmost extent to which a court, either of law or equity, can give relief under the statute of frauds. The deed is void, only as to the creditors. After they are satisfied, the surplus belongs to the grantee.

Herne v. Meeres, as reported in Vernon, is to this effect: The

bill was by creditors of Cox against Meeres. Cox was outlawed and absconded. Meeres purchased from Cox, with notice of all the facts, a life-estate at three or four years purchase. The creditors, afterwards, obtained a judgment, and filed their bill to be relieved against this purchase as a trust, or else as a fraud, it being at a great undervalue. The court is reported to have said: "The purchase is at a great undervalue, and huddled up in haste, at a time when young Cox concealed himself from his creditors, and carries another ill circumstance with it, that the defendant is a trustee in the marriage settlement; and for him to buy the life-estate of the husband, was to take away the maintenance and support thereby intended and provided for the wife and children, on whose behalf he was entrusted, and all this, with notice of the plaintiff's debts, and proceedings at law, which ought to have some weight in the case; and although the plaintiff's securities were not such as did immediately affect the land, yet the notice was such, and Cox's absconding, had he been a trader, would have made him a bankrupt, and then the defendant must have lost all his money; and so, at law, when a conveyance is found to be fraudulent, the creditor comes in and avoids all, without the repayment of any consideration-money; and in equity, therefore, when the court can decree back the principal and interest, there is no hurt done, and a lesser matter in such a case will serve to set a conveyance aside."

It is difficult to extract from this reasoning, the principle on which relief was given. There is no intimation of any suspicion of a collusion to defraud the creditors. The reference to the trust, the inadequacy of price, and the distressed circumstances of Cox, would tend to show that the transaction was a fraud upon Cox, against which he might be relieved; and the terms of the decree, as stated from the register in 2 Bro. C. C. 177 (n), seem to place the relief on that ground. It states that "the bargain made by Sir T. Meeres with Cox, was not fairly obtained, in respect of the circumstances Cox was in, but ought, in conscience, to be made void, the premises purchased by him being more than double the value of the money paid by him, and therefore he should be considered as a mortgagee." I think this case proceeded upon the principle stated by Lord Hardwicke, in *Bennet v. Musgrove*: The substitution, in equity, of a judgment-creditor, to the right of his debtor to impeach a conveyance for a fraud practiced upon him. The circumstances under which the conveyance was procured, were such as that in equity Meeres was a trustee for Cox; and this equitable right of

Cox might be pursued in equity by a judgment-creditor, as such a creditor might, in the case of a mortgage, claim, in equity, the benefit of the debtor's equity of redemption.

The case of *Barwell v. Ward*, decided by Lord Hardwicke in 1744, was this: The defendant's brother conveyed to her the moiety of a reversionary estate for less than half its value, and in a month after was committed to jail, and became bankrupt by failing to give bail for two months. By the chancellor: "The present is a plain case, and appears to be a fraudulent conveyance to cover the estate, for the deeds were executed when Ward was in declining circumstances." "No more than sixty pounds paid for the moiety of an estate in reversion, of the value of thirty-nine pounds a year, which is pretended to be redeemable upon the payment of sixty pounds, but no clause of this kind is in the deed itself, for it is an absolute bargain and sale. The court in this case ought to do no more than to let the deed stand as a security for the money really and *bona fide* advanced," and accordingly ordered an inquiry as to the amount. It is difficult to ascertain, from the report of this case, upon what principle the court proceeded, if not upon this, that the assignees were entitled to assert the rights of the bankrupt, and asserted their claims in that character, and that the conveyance was admitted by the defendant to be redeemable.

If, however, the rule laid down in *Boyd v. Dunlap*, as deduced from those cases, be the true rule, then this case does not fall within the rule, since it is a clear case of actual and gross fraud in Wingfield and Coleman, and Garland is a purchaser from them, with full notice of the fraud and invalidity of their title. If the rule I have gathered from those cases is the true rule, then there was, in this case, no fraud or imposition on Lewis Nicholas, of which he could complain, and consequently the rule is not applicable to this case.

Upon those scanty and equivocal materials we are urged to sanction the doctrine, that a court of equity will allow a party to advance his money with a view to enable a debtor to secure himself or his family, fraudulently, all his property against his creditors, except what may be necessary to repay the money advanced; or a creditor to permit his debt to be used in like manner; and when the fraud is detected and exposed, to suffer the deed, declared by the statute to be utterly void as to creditors, to stand as a security to their prejudice for the money advanced or the debt due, so that the experiment would be made without hazard to any party concerned. This, I think,

would be to repeal the statute. It would offer the greatest temptation to such fraudulent experiments, and the delay at least, which is commonly one of the principal objects of such transactions, would be effected without loss to the parties concerned in the fraud.

The only inquiry which remains to be made is, whether it be competent for the appellant to impeach the judgment on which the appellee's claim is founded, on the ground that the original transaction was usurious; and if he can, and should succeed in impeaching it, whether Rives's claim would be thereby wholly avoided or relief given for the usurious excess only.

It seems from the case of *Scott v. Nesbit*, 2 Bro. C. C. 641, that a plaintiff coming into a court of equity, and claiming by force of a judgment at law, any third person, affected by the judgment, may resist the plaintiff's claim upon the ground that it is usurious, if that question had not been tried and decided at law; and in such case the court of equity will adopt the same rule that prevails when the usurer is a defendant in equity; relieving only as to the usurious excess. It is, however, unnecessary to examine these doctrines.

In this case, Rives's suit was depending, and eagerly prosecuted, at the time that the conveyances were executed for the purpose of defeating the fruits of his action. The suit was defended on the plea of usury; and every fact, upon which it is now sought to establish the charge of usury, was submitted to the court of law and the jury, except only the negotiations between Rives and Nicholas, respecting a purchase of lands, which appears in Rives's answer to the cross-bill; but in such a form as not to affect the question of usury. The deposition of Wilson C. Nicholas was properly excluded in the trial at law, and is not evidence in this cause. Upon the question whether one is or is not a debtor, an adversary judgment against him is evidence *prima facie*, that he is a debtor, even as against strangers, who claim under him property affected by the judgment. If they attempt to impeach the judgment, it must be done on the ground of fraud, or by showing that a full defense was not made, and producing new proof, showing that the debt is not due. But, in a case like this, of a purchase pending the suit, and for the purpose of fraudulently defeating the objects of the suit, it seems to me that the purchaser ought to be bound by the judgment, as the debtor was bound.

If a court of equity could, in this case, pronounce this transaction usurious, upon the very same facts on which the court of

law and jury have pronounced it not to be usurious, then it would virtually be an appeal from the court of law to the court of equity; and the court of equity would re-examine the judgment of the court of law and virtually reverse it. This is not within the jurisdiction of a court of equity; which relieves against judgments at law, not because they were wrong, but because of some new matter, which the court of law did not, or could not, pronounce a judgment on, or which, for some just cause the party could not bring to the consideration of the court of law. Whether the transaction in question was a loan or a sale, was emphatically proper for the decision of a jury; and a jury having decided that question, upon the very same evidence now submitted to a court of equity, that decision is conclusive, although we might differ in opinion from the jury, as to the effect of the evidence.

Upon the whole, the decree is right, and should be affirmed.

CARR and COALTER, JJ., concurred, and the decree was affirmed.

BROOKS, P.J., and CABELL, J., absent.

HAMILTON v. SHREWSBURY.

[4 RANDOLPH, 427.]

IF PROCEEDINGS UNDER AN EXECUTION ARE WHOLLY VOID a purchaser gets no title, and as the defendant may have redress by an action of detinue, equity has no jurisdiction.

WHERE A LEVY IS SO FAR VALID as to bind the property, but the sale is void on account of interest, or improper conduct in the officer, the court issuing the execution may give redress by quashing such execution, etc.; and, therefore, there is no jurisdiction in equity.

PROPERTY NOT BEING PRESENT AT A SALE ON EXECUTION is not sufficient, of itself, to vacate the sale, but for any improper conduct of the sheriff in this respect or otherwise, the party injured may have an action against him.

A BONA FIDE PURCHASER UNDER AN EXECUTION, having no notice of any misconduct of the officer, will not be prejudiced by such misconduct, but will get a good title.

APPEAL from the Greenbrier chancery court. The necessary facts appear from the opinion.

Leigh, for the appellant.

Johnson, for the appellee.

CABELL, J. The sheriff of Kanawha county, by virtue of an execution against the goods and chattels of the appellant, sold

a slave belonging to the appellant at public sale, and the appellee became the purchaser thereof. The object of the bill in this case is to recover back the slave; and the question is, whether a court of equity ought to interfere for that purpose, under the circumstances attending the case.

The sale is objected to on three grounds: 1. That the deputy sheriff was so interested as to be incapable, in point of law, of acting as sheriff on this execution, he having once owned, and having assigned the judgment; 2. That the sheriff refused to receive from the appellant a forthcoming bond with good security; and, 3. That he sold the slave without having him present at the time and place of sale, the said slave having previously run away.

There is no allegation in the bill of any fraud or collusion in the appellee, nor of any knowledge by him of any fraud or improper conduct on the part of the sheriff. If the proceedings under the execution were wholly void, no title passed by the sale to the purchaser, and there was no impediment to an action of detinue in a court of law. If, as was contended by the counsel for the appellant, the levying of the execution was so far valid as to bind the property, but the sale thereof was void on account of the interest or improper conduct of the sheriff who made the sale, still the appellant had complete redress at law. The court from which the execution had issued would, on application, have corrected the abuse of its process, by quashing the execution, setting aside the sale, and restitution of the property might have been enforced at law. In neither event, therefore, ought a court of equity to interfere.

But I am clearly of opinion that the title to the property passed by the sale to the appellee. He is a fair purchaser without imputation of fraud or collusion, and without knowledge of any improper conduct on the part of the officer.

The mere circumstance of the sheriff having sold the property without its being present at the time and place of sale, is not, of itself, sufficient to vacate the sale. Such sale may, under circumstances, be right and proper. There is no proof of such loss to the appellant as would justify the court of equity to interfere, even if it had jurisdiction. If the sheriff has been guilty of improper conduct in this respect, or in refusing to receive a delivery bond when he ought to have received it, he is responsible for damages in an action at law, to those who may be injured.

This case is very different from that of *Carter v. Harris*, lately

decided in this court. In that case the sheriff was the plaintiff in the judgment. He sold the property under the execution, and became himself the purchaser, after having fraudulently taken measures to prevent others from bidding or giving a fair price for it. It was his own personal fraud that justified the interference of equity. There is no such ingredient in this case, and the decree ought to be affirmed.

The other judges concurred.

BROOKE, P.J., and COALTER, J, absent.

ALMOND v. ALMOND.

[4 RANDOLPH, 662.]

ALIMONY WITHOUT A CONTRACT OF SEPARATION may be granted by a court of chancery in Virginia, where the husband turns his wife out of doors, or his conduct renders it unsafe for her to live with him.

RIGHT TO ALIMONY GIVES NO LIEN on specific property of the husband in such a case, but is personal against him.

APPEAL from the Fredericksburgh chancery court. The opinion states the case.

Briggs, for the appellant.

Harrison and Stanard, for the appellee.

CARR, J. This is a bill filed by Mrs. Almond, by E. Cox, her next friend, against her husband for alimony. It states that she brought him seven or eight negroes, which have all been wasted by him in riot and drink; that her brother gave her a girl after her marriage, who has had three children; that her husband treated her with great cruelty, beating her in his drunken fits, which became so frequent and intolerable that she was at length obliged to leave him and throw herself upon the charity of her son; that when she went, her husband told her to take her present along, meaning the woman; that the woman and her children soon after joined her at her son's; that her husband, though he had disclaimed any right in the property, came to her son's, took the children and sold them out of the state, saying, at the time, that he left the mother at her free disposal; but he has since brought suit against the said Cox for her, and recovered a judgment for her at law, which he will enforce unless prevented. The bill prays that the court would

decree her a separate maintenance, that she may be quieted in the possession of the slave, and the judgment enjoined.

The answer denies that the defendant ever treated his wife amiss; that she became morose and ill-tempered, and at length, without cause, left him; that he was anxious for her return, and solicited her often to come back to him; that she did so, and remained with him from 1815 to 1818, when she again, without cause, left him; that ever since her last separation he has been entirely willing, and still is so, to receive her back; and while she behaves as a wife, will treat her with the kindness due to one; that as she has voluntarily separated from him, she has no right to a separate maintenance; and he submits whether, by the law of the land and the constitution of the courts of equity, that court has jurisdiction of the case where there are no articles of separation between the parties, no divorce, nor any trust fund for the use of the wife the disposition of which the court might control, and where by their interposition the court would take from him the only means of discharging the claims of his creditors, the funds tied up by his wife being by far the greater part of what he is worth.

There is evidence in the record of the defendant's bad habits; that he is addicted to drinking, beyond the hope of reform; that he has treated his wife badly, beating and abusing her in his drunken frolics, and that she can not, in the opinion of the witnesses, live in peace and safety with him; also, that he has wasted his whole property, that now in contest in this suit excepted; and that the negro woman is dead. There certainly is nothing like an agreement between the parties for living separately, nor any arrangement as to their property in case of separation. It is proved by four witnesses, that when the defendant went to take, and did take, the children forcibly from Cox, he said he left their mother for his wife's use. Some say he said he had no claim to her; others that she was free to dispose of her as she pleased. But there is nothing like a contract; nothing in such a form, that equity could act upon it under the idea of executing an agreement. The chancellor dissolved the injunction, and dismissed the bill.

Can we say that he erred? In England, matters of this kind belonged principally to the ecclesiastical jurisdiction. It was only incidentally that courts of equity acted upon it, where there have been articles of separation between man and wife, by which she is allowed so much for her separate maintenance, there equity will, at her suit, carry these articles into execution,

while the separation continues, or where a woman applies to the court upon a *supplicavit* for security of the peace against her husband, and it is necessary that she should live apart; as incidental to that, the chancellor will allow her a separate maintenance.

In *Head v. Head*, 3 Atk. 295, Lord Hardwicke says: "The principal grounds for bills of this kind are an agreement for maintenance, or a trust for this purpose, and in either of these cases the court will entertain a suit for alimony and maintenance; and even after sentence in the ecclesiastical court for it, when the husband, in order to evade it, is going out of the kingdom, will, upon a bill filed by the wife, grant a *ne exeat regno*."

The same case afterwards came before the court again: 3 Atk. 547. Sir Francis Head had written to his wife's father, saying: "I am willing to send her one hundred pounds, and no more, between this and Christmas, and to continue such quarterly payments when it shall best suit my convenience, so long as we shall continue separate." Lady Head brought her bill for execution of this as an agreement for separate maintenance, and prayed liberty to live separately, and that the court would decree payment of the money. Lord Hardwicke said: "As to the liberty prayed, it is not in the power of the court to decree it, and I do not find that this court ever has made a decree for establishing a perpetual separation between man and wife, or to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even upon this, unwillingly." He went on to decide that the letter of the defendant was not an agreement to continue during their lives, but merely for her maintenance during an occasional absence, and Sir Francis having, by his answer, offered to receive her again. The chancellor decreed only the arrearages of the maintenance, and that he should receive and treat her as a wife; and if she did not return within a month, the allowance should cease; but if she returned, and the defendant refused to receive her, and maintain and treat her as a wife, the maintenance should continue.

In *Ball v. Montgomery*, 2 Ves. jun. 195, Lord Rosslyn says: "It is contrary to the established doctrine that a married woman should be a plaintiff, in this court, for a separate maintenance." "I take it to be now the established law that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some

other matter that she becomes entitled to a separate provision. If she applies to this court upon a *supplicavit* for security of the peace against her husband, and it is necessary that she should live apart; as incidental to that, the chancellor will allow her separate maintenance. So in the ecclesiastical court, if it is necessary for a divorce *a mensa et thoro propter sævitiám.*" There are other cases which say that the subsistence has been provided for the wife by this court, either where the husband has turned her out of doors; or by ill-treatment obliged her to leave his house; or has quitted the kingdom, leaving her destitute: See *Duncan v. Duncan*, 19 Ves. 394, and the cases there cited. See, also, 1 Fonb. Eq. 104, a learned note, where all the cases are brought together. This seems to be a brief view of the law in England.

I find no case with us in which the subject has been before this court. Having no ecclesiastical tribunal, the powers of that court seem to have been considered as vesting originally in the old general court; from thence some of them have been distributed to other courts, as they were branched out. The power over the probate of wills, executors and administrators and distributions, etc., were given to the district, superior, county and corporation courts. I know of no law which has given to any court the trial of matrimonial causes, except so far as relates to incestuous marriages, as to which, a power is given to the court of chancery to annul them. Judge Tucker, in his *Blackstone*, third vol., 94, says: "With respect to suits for alimony after a divorce *a mensa et thoro*, as there is no court in Virginia which possesses jurisdiction in such cases, so until there is such court there can be no room for suits of this nature, unless, perhaps, the high court of chancery should sustain them as incidental to its equitable jurisdiction."

The suit before us is not after a divorce, but a voluntary separation, if that may be called voluntary which seems to have been forced upon the wife by ill treatment. I believe that in practice the county courts, sitting as courts of equity, have assumed the power of giving separate maintenance in cases of separation, but by what rule they have been regulated I know not. The jurisdiction was sustained by the chancellor of the Richmond chancery court, in *Purcell v. Purcell*, 4 Hen. & Munf. 507, and the reasoning of the chancellor on the point of jurisdiction seems to me sound. If there be a contract for separation it is conceded on all hands that equity might, in proper

cases, enforce that contract. But, suppose a husband to turn his wife out of doors, or to treat her so cruelly that she can not possibly live with him; suppose him to persevere in refusing to take her back or to provide a cent to feed and clothe her, surely, in a civilized country there must be some tribunal to which she may resort. She can not be out of the protection of the law, an outcast, dependent on the charity of the world, while her husband may have thousands, and she may have brought him all. I would, in such cases, unquestionably stretch out the arm of chancery to save and protect her.

But, assuming jurisdiction, I should be cautious to regulate it by the rules which have been established elsewhere. If the parties have made an agreement, that should be the standard; if not, I would take the practice of the court in analogous cases. There has certainly been no contract here. I find it laid down, that where a separation has taken place, and the wife sues for a support, if the husband, in his answer, states that she left him of her own accord, that he has offered to receive her, and is willing to receive and treat her well, the court refuse the maintenance. In the answer before us, there is an entire willingness expressed to receive her back and treat her as a wife. But, though this be a general rule, there must be exceptions to it. Suppose it fully proved to the court that the husband was in the constant habit of intoxication; that when drunk, he was a madman, and his anger particularly pointed at his wife. Surely, the court would not, because of the offer to take her back, refuse a support, and thus force her either to hazard her life, or to depend on charity. I do not mean to say that this is such a case, but I put it to test the principle.

I have considered the case thus much at large, because it is entirely new in this court. There is a specific objection to the proceeding here, on which I think the judgment of the court below must be sustained. The demand is not for alimony or maintenance generally, but that a judgment which the husband has recovered for a specific piece of property, a negro woman, shall be enjoined, and the wife quieted in the possession of that woman. Now, the claim of the wife for alimony is a personal claim on the husband; she has no lien on any specific property without an agreement. She can no more, therefore, ask the court to assign her this negro, or that tract of land, than a creditor of the husband could come into court and ask such assignment, which we know, without a particular lien, could not be done.

Under this view of the case, I think the injunction was properly dissolved, and the bill dismissed.

The other judges concurred, and the decree was affirmed.

BROOKE, P.J., and COALTER, J., absent.

ALIMONY, INDEPENDENT SUIT FOR.—There is much conflict in the decisions upon the question as to whether, without the aid of a statute, a court of equity has jurisdiction to entertain an independent suit for alimony, but the preponderance of authority seems to be against the jurisdiction: See the note to *Field v. Field*, 12 Am. Dec. 257.

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2. ACTS OF AGENT, HOW FAR BINDING.—The acts of an agent, whether of the government or of an individual, are binding on the principal only to the extent of the authority conferred. *Martin v. United States*, 129.
3. A POWER TO COLLECT implies only an authority to demand and receive the thing due on an obligation, and not an authority to commute for any other thing. *Id.*
4. A GOVERNMENT COLLECTOR OF REVENUE has no power, without special authority, to receive anything but money on a demand due the government. Hence, a plea of payment of such a demand to a collector, in anything but money, must aver a special authority to receive it. *Id.*

ALIMONY.

1. WITHOUT A CONTRACT OF SEPARATION may be granted by a court of chancery in Virginia, where the husband turns his wife out of doors, or his conduct renders it unsafe for her to live with him. *Almond v. Almond*, 781.
2. RIGHT TO, GIVES NO LIEN on specific property of the husband in such a case, but is personal against him. *Id.*

AMENDMENTS.

See BILLS OF PARTICULARS, 2, 3; JUDGMENTS, 7, 9.

ANIMALS.

1. DOGS, LIABILITY FOR.—One who keeps a dog, having notice that it is in the habit of worrying or injuring the stock of others, is liable for the injury it commits. *Hinckley v. Emerson*, 383.
2. DOGS, KILLING OF.—A dog which attacks persons, or kills sheep, may be killed by any one as a nuisance. It may also be killed by one on whose land it is chasing domestic animals; and, in other cases, when necessary to separate it from animals which it is attempting to kill or injure. *Id.*

APPROPRIATION OF PAYMENTS.

APPROPRIATION OF MONEY.—If the law appropriates money to a person in a particular character, he must receive it in that character, though it injures him to do so, and although the law was designed to benefit him. *Lichtenthaler v. Thompson*, 581.

ARREST.

A FEME-COVERT may be imprisoned on a *ca. sa.* but not upon *meane process*. *McKinstry v. Davis*, 269.

ASSIGNMENT.

1. SCHEDULE, EFFECT ON GENERAL TRANSFER.—A general transfer of all estate, real, personal and mixed, as at large, and fully explained by a schedule thereof annexed, will be confined to the property enumerated in the schedule. *Scott v. Coleman*, 71.

2. **ACKNOWLEDGMENTS OF AN ASSIGNOR**, in relation to a claim made before its transfer, are evidence in an action between the assignee and the party against whom the claim exists. *Id.*
3. **PREFERRING CREDITORS**.—A debtor may prefer such creditors as he pleases, and may make an assignment for their benefit only. *Mackie v. Cairns*, 477.
4. **AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS** may be valid as between the parties, though void as against non-assenting creditors. If, subsequent to the assignment, the assignor confess judgment in favor of the assignees, there is no estate remaining in him on which the judgment can operate, for the parties can not be heard, to show that their own deed was fraudulent, and therefore void. *Id.*

See FRAUDULENT CONVEYANCES, 6, 7.

ASSUMPSIT.

BY ONE PARTNER OR CO-TENANT against another may be sustained when the joint interest has terminated, or the partnership has been dissolved, all accounts being settled and discharged, and a balance remaining due. No express promise to pay such balance is essential. These principles were applied between part owners of a vessel which had been engaged in a whaling voyage. *Fanning v. Chadwick*, 233.

ATTACHMENTS.

1. **FOREIGN**.—It is a good defense that the amount sued for has been recovered of the defendants by a foreign attachment in another state. *Scott v. Coleman*, 71.
2. **PAYMENTS ON JUDGMENT**, in proceedings by foreign attachment, are valid, though made before the issue of execution. *Id.*
3. **ATTACHMENT** of the debt sued upon may be pleaded in abatement. *Id.*
4. **A STAGE-COACH IS LIABLE** TO, although part of the horses are hitched on, and the passengers engaged, but not seated; also, if it has reached its destined place, though two passengers yet remain seated in the expectation of being taken to their residences. *Potter v. Hall*, 226.
5. **JURISDICTION OF A CAUSE, UPON**, in a justice's court, depends upon its being made to appear that the defendant is concealed within the county with the intent mentioned in the act, or has departed, or is about to depart from the county with like intent. *Adkins v. Brewer*, 264.

AUCTIONS.

See STATUTE OF FRAUDS, 2, 3, 4, 5.

AUDITA QUERELA.

1. **ANY MATTER WHICH MIGHT HAVE BEEN PLEADED** to the original action can not be the foundation of an *audita querela* to be relieved from the judgment. *Staniford v. Barry*, 692.
2. **DEFINITION**.—"Audita querela," is an equitable action, which lies for a person who is either in execution or in danger of being so, on a judgment when he has matter to show that such execution ought not to have issued, or should not issue against him. *Id.*

3. **MATTER WHICH THE DEFENDANT HAD NO OPPORTUNITY TO PLEAD**, whether accruing before or after judgment, may be made available for his relief by the aid of the writ of *audita querela*. *Id.*
4. **INJURY ARISING FROM THE NEGLIGENCE** of complainant can not be relieved by *audita querela*. *Id.*
5. **AUDITA QUERELA** bears solely on the acts of the opposite party, and not at all upon the judgment of the court. If an error of the court has been committed, the remedy is by writ of error, or by motion for a new trial. *Little v. Cook*, 698.
6. **A DECISION UPON AUDITA QUERELA**, if in favor of the complainant, puts an end to the judgment, so that no further proceedings can be taken upon it. The complainant also recovers damages for the wrongful act complained of. The complaint sounds in tort, the proper plea is not guilty, and damages are recovered from the one who did the wrong. *Id.*

BANKS.

1. **BANK BOOKS, RIGHT TO INSPECT.**—The depositors are entitled to inspect the books of the bank on all proper occasions, and the officers having charge of the books are, so far, agents of both parties. *Union Bank v. Knapp*, 181.
2. **CREDITS IN A DEPOSITOR'S book** are as binding on the bank as a formal receipt. *Id.*
3. **IF BANK NOTES BE DESTROYED**, the owner may recover their amount from the bank in an action at law. *Ross v. Bank of Burlington*, 684.
See BONDS, 1; CORPORATIONS, 1.

BANKRUPTCY AND INSOLVENCY.

DECISION OF COMMISSIONERS appointed to receive and examine claims against insolvent estates, is final on the rights of the parties unless vacated by appeal. *Stanford v. Barry*, 691.

See SOVEREIGNTY, 2:

BARRATRY.

See CHAMPERTY, MAINTENANCE AND BARRATRY.

BILLS OF PARTICULARS.

1. **A BILL OF PARTICULARS** should give as much information as a special declaration. *Babcock v. Thompson*, 235.
2. **A BILL OF PARTICULARS** is amendable, like a declaration. *Id.*
3. **AMENDMENT OF**, may be allowed after the cause has been tried, a new trial granted, and two notices of trial after this, on payment of costs of the motion, and all costs, if the defendant, on account of the amendment, changes his defense. *Spawen v. Veder*, 401.

BONA FIDE PURCHASER.

A BONA FIDE PURCHASER, without notice of any fraudulent design, will be protected under the statute of frauds. *Garland v. Rice*, 756.

See EXECUTIONS, 42; FRAUD, 3; FRAUDULENT CONVEYANCES, 15.

BONDS.

1. **OF BANK CASHIER.**—A cashier's bond conditioned "for the faithful discharge of the duties of his office," is broken by his violation of any valid by-law which the corporation may adopt. *Bank of Carlisle v. Hopkins*, 113.
2. **SHERIFF'S BOND.**—A parish judge's certificate, that a sheriff's bond has been executed with the concurrence of the justices, is evidence that the assueries were approved by them. *Whitehurst v. Hickery*, 167.
3. **OFFICIAL BOND.**—THE FAILURE TO RECORD an official bond does not invalidate it. *Id.*
4. **NO PARTICULAR FORM OF RECOGNIZANCE** of bail in error is necessary. *Van Antwerp v. Newman*, 340.
5. **A BOND VOID IN PART** as against the positive provisions of a statute is wholly void. *Mackie v. Cairns*, 477.

See GUARDIAN AND WARD, 2.

BOUNDARIES.

1. **TERMINI, QUESTIONS OF.**—What are the *termini* or boundaries in a grant or deed, is a question of law for the court; where those boundaries or *termini* are, is a question of fact for the jury. *Doe v. Paine*, 507.
2. **NATURAL OBJECTS**, when found, prevail over courses and distances. *Id.*
3. **COURSES AND DISTANCES** may be used as guides by which to find natural objects, or to determine, in cases of doubt, which of the two or more natural objects is the one intended. They explain latent ambiguities, but do not control natural boundaries. *Id.*
4. **COMMON REPUTATION** is admissible in questions of boundary. *Taylor v. Shufford*, 512.
5. **ASTRONOMICAL OBSERVATIONS** may be employed to find the true location of a line, and are likely to be more accurate than a survey made by commencing at the initial point and running by the compass. *Id.*
6. **EQUITABLE JURISDICTION.**—A court of chancery has no jurisdiction to settle boundaries unless some equity be superinduced by act of the parties. *Stuart's Heirs v. Coalter*, 731.
7. **IN A PARTITION SUIT** the title is not meddled with, but the plaintiff must show a clear legal title; hence, if he prays a settlement of boundary and a decree for the delivery of land in the defendant's possession, it is not a proper case for partition in equity. *Id.*
8. **PARTITION AND ADJUSTMENT OF BOUNDARIES** cannot be prayed in the same suit, where the defendants against whom the latter relief is sought are merely coterminal land-owners not affected by the equity as to partition. *Id.*

See EVIDENCE, 23, 30.

CHAMPERTY, MAINTENANCE AND BARRATRY.

1. **CHAMPERTY, MAINTENANCE AND BARRATRY**, the policy and history of the law of, considered and explained. *Thalhimer v. Brinckerhoff*, 303.
2. **A RIGHT OF ACTION** could not be assigned at common law. This rule has been very generally superseded at law, and never prevailed in equity. *Id.*
3. **PART OF A CAUSE OF ACTION** can not be transferred. *Id.*

4. **MAINTENANCE**.—Maintaining the suit of another is lawful, if the person so maintaining has an interest in the suit, vested or contingent, or is connected with the suitor in some social relation, or by the ties of affinity or consanguinity, or in the relation of landlord and tenant, master and servant, or attorney and client, or is moved by the impulse of charity. *Id.*
5. **A CONTRACT BETWEEN AN heir and his brother-in-law**, by which the latter promised to bear one half of the expenses to be incurred in certain actions about to be brought, in consideration that the former would convey him one fourth of the property which should be recovered, is valid; and if the suits are brought and compromised, and the property conveyed by the heir, the brother-in-law may, in an action of *indebitatus assumpsit* for money had and received, recover his share of the proceeds. *Id.*
6. **MAINTENANCE**.—The law of maintenance is intended only to prevent the interference in a suit of strangers having no interest in the litigation, and standing in no relation of duty to the suitor. *Id.*
7. **A HUSBAND WHOSE WIFE** may possibly be heir to a claimant may lawfully maintain the suit of the latter upon an agreement to share its proceeds. *Id.*
8. **MAINTENANCE**.—A deed is not void for maintenance or champerty if the lands are not at the date of its execution held adversely to the grantor. *Jackson v. Johnson*, 433.

CONFUSION OF BOUNDARIES.

See BOUNDARIES, 6, 7, 8.

CONSTITUTIONAL LAW.

1. **CONSTITUTION OF UNITED STATES**.—The provision of the constitution of the United States, that "cruel and unusual punishments shall not be inflicted," is a restriction upon the national government only, and does not limit the powers of the state. *Barker v. People*, 322.
2. **ELIGIBILITY TO OFFICE** belongs to all persons not excluded by the constitution, and arbitrary exclusions from office can not be established by the legislature, nor can it impose any general qualification which the constitution does not require. *Id.*
3. **THE POWER TO PROVIDE PUNISHMENTS FOR CRIMES** is vested in the legislature not by limited grant or special authority. It is a part of the sovereign power of the state to maintain social order, to define crimes, to establish a criminal code, and to take life and liberty when necessary, and to produce the end by adequate means. *Id.*
4. **A JUDGMENT UPON IMPEACHMENT** can, by the constitution, extend only to removal from, and disqualification to hold, office. This provision is a limitation and not a grant of power. *Id.*
5. **RESTRICTIONS ON LEGISLATIVE POWER TO DEFINE CRIMES** and to provide for their punishment necessarily exist, though not expressed in special terms; thus, the legislature can not make it criminal to exercise any right guaranteed by the constitution. *Id.*
6. **ELIGIBILITY TO OFFICE** may be taken away from a citizen as a punishment for a crime of which he has been convicted, although the constitution declares that each house of the legislature is the judge of the qualifications of its own members. *Id.*

7. **DUELING, PUNISHMENT OF.**—The legislature has authority to enact that any person convicted of challenging another to fight a duel, etc., "shall be incapable of holding, or being elected to, any post of profit, trust or emolument, civil or military, under this state." *Id.*
8. **A SPECIAL STATUTE** granting the right to appeal after the expiration of the time prescribed by law is void. *Staniford v. Barry*, 691.

CONTRACTS.

1. **MERGER OF ARTICLES OF AGREEMENT.**—Articles of agreement do not merge into a conveyance subsequently executed in pursuance thereof. *Speed v. Hann*, 78.
2. **A COVENANT** contained in an agreement for the conveyance of a tract of land to pay for what it may lack of a certain quantity, is not performed by conveying the land, describing it to contain that quantity, if it do not, in fact, contain it. *Id.*
3. **WHO MAY SUE ON.**—One may maintain an action on a stipulation in his favor, to which he is not a party. *Marigny v. Remy*, 172.
4. **A STATED ACCOUNT** is an agreement of both parties that all the charges are true, and is conclusive until leave is given to surcharge, falsify or open it. *Union Bank v. Knapp*, 181.
5. **IN RESTRAINT OF TRADE**, made on good consideration, and not extending beyond the obligee's sphere of actual business, is valid. A condition in a bond that M. shall cease to have any concern in the business of boating on the Connecticut river, and shall give the obligees all the freighting of his goods at customary price, etc., and shall not directly or indirectly aid, countenance, or promote any other boatman, is not void. *Palmer v. Stebbins*, 204.
6. **FOR THE PURCHASE** of goods for two may be for their equal, without being for their joint benefit. *Hull v. Connolly*, 613.
7. **AGREEMENT AGAINST PUBLIC POLICY.**—An agreement to grant certain privileges, in consideration of the withdrawal of the opposition to the passage of an act through the legislature, is against public policy, and void. *Pingry v. Washburn*, 676.

See EQUITY, 3, 4, 5, 6, 7; INFANCY.

CONVERSION.

1. **CO-TENANCY.**—One co-tenant may maintain trover against another for the conversion of their common property. *Bell v. Lyman*, 83.
2. **WHAT IS NOT.**—The use of property by a stranger in partnership with one of the co-tenants is not a conversion; nor is such stranger or his partner liable for a conversion because the property is levied upon and sold under process against them. *Id.*
3. **CONVERSION** is any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of their possession. *Hale v. Ames*, 150.

CORPORATIONS.

1. **A BANK** having power to adopt by-laws, and to exact from its cashier a bond conditioned for the faithful discharge of the duties of his office, may enlarge the condition so as to embrace all the duties which it could by its by-laws exact, though such duties are not specified in the by-laws adopted. *Bank of Carlisle v. Hopkins*, 113.

2. **CORPORATE POWERS.**—The creation of a corporation gives it, without any express grant, the power of buying and selling. This power may, however, be denied or limited by the charter or by general law. *The Bank v. Poitiaux*, 705.
3. **PURCHASE BY CORPORATION OF MORE REAL PROPERTY** than by its charter authorized, is not void. The corporation acquires and may at any time before dissolution convey the title. *Id.*
4. **VIOLATION OF CHARTER** by a corporation can not be collaterally inquired into in a suit brought by it on its contract with the defendant. *Id.*
5. **CORPORATE SEAL** is not essential to an agreement to convey real property. *Id.*

See **BANKS**.

COSTS.

PROTEST.

COUNTERFEITING.

See **NEGLIGENCE**, 1.

COVENANTS.

See **CONTRACTS**, 2.

CREDITOR'S BILLS.

CREDITOR'S BILLS to reach and discover the property of the debtor, placed in the hands of others, may be maintained. *Fellows v. Fellows*, 412.

CRIMES.

See **CONSTITUTIONAL LAW**, 3, 5.

CRIMINAL LAW.

See **CONSTITUTIONAL LAW**, 3, 4, 5, 6, 7.

CURTESY.

1. **TENANT BY.**—The birth of a child at any time during coverture, constitutes the second husband tenant by curtesy initiate of all the lands of which the wife was, during coverture, so seised as to support such an estate. That the lands are held adversely when the child is born does not defeat the husband's right. *Jackson v. Johnson*, 433.
2. **TENANCY BY.**—During the existence of this estate the lands do not descend to the heirs so as to give them a right of entry. *Id.*
3. **SEISIN IN FACT** on the part of the wife is not essential to constitute the husband tenant by curtesy; seisin in law is sufficient. When the title of the person claiming is complete without any entry, no actual seisin can be required to constitute her husband tenant by the curtesy. *Id.*
4. **TENANCY BY THE CURTESY DOES NOT EXIST** unless there has been: 1. Marriage; 2. Seisin; 3. Issue born alive; and, 4. Death of the wife. *Id.*

DAMAGES.

See **IMPROVEMENTS**, 3; **NEW TRIALS**, 3.

DEEDS.

AN ASSIGNMENT OF A DEED, indorsed thereon, does not convey any interest in the lands therein described. *Bentley's Heirs v. Deforest*, 546.

See CHAMPERTY, 8; INSANITY, 4, 5.

DISTRESS.

See LANDLORD AND TENANT, 12, 13.

DIVORCE.

1. A DIVORCE WILL BE DENIED, even on the ground of adultery, if the wrongful act was caused by the complainant. *Pierce v. Pierce*, 210.
2. DIVORCE WILL BE REFUSED when the applicant is guilty of the same crime of which he complains. *Mattox v. Mattox*, 547.

DOGS.

See ANIMALS.

DOWER.

1. IN EQUITABLE TITLE.—Dower is not demandable in land held by the husband, under a bond for title, unless, before his death, the purchase-money has been fully paid. *Pugh v. Bell*, 142.
2. A WIDOW CAN NOT BE BARRED of her dower by a devise of an estate for years, nor by a provision in personal estate. *Wiseley v. Findlay*, 711.

DUELING.

See CONSTITUTIONAL LAW, 7.

EASEMENTS.

1. PRESUMPTION OF GRANT OF RIGHT OF WAY does not arise until there has been an uninterrupted use for twenty years, acquiesced in by the owner of the land. The way claimed must be definitely located; no right can be acquired, in common with other neighbors, over uninclosed land, the routes used being changed with every change of fields and fences at the will of the owner. *Turnbull v. Rivers*, 622.
2. WAY OF NECESSITY.—The necessity from which the grantee derives a right of way is, when the lands purchased are surrounded on all sides by the lands of the grantor. If the land can be reached by water, or by a distant or difficult road, the grantee is not entitled to a way across lands of the grantor; for it is necessity, and not inconvenience, that gives the right. *Id.*

EJECTMENT.

1. DEFENSE OF EXECUTION-DEFENDANT.—If defendant in execution is in possession he can not defend ejectment brought by the purchaser, by showing title in another. *Jackson v. Town*, 405.
2. TENANTS IN COMMON may make a joint demise. *Massie's Heirs v. Long*, 547.
3. PROCHIEIN AMI can not make a demise in ejectment. *Id.*
4. PLAINTIFF MAY SUE IN ONE EJECTMENT all persons in possession of any part of the land he claims. (*Per* CARR, J.) *Stuart's Heirs v. Coalter*, 731.

See EVIDENCE, 3; LANDLORD AND TENANT, 1.

EQUITY.

1. A MISTAKE OF COUNSEL in not moving for a new trial, or of defendant in calculating when the trial would be reached, is no ground for relief in equity. *Yancey v. Downer*, 35.
2. PREVENTING MULTIPLICITY OF SUITS is a favorite object of courts of equity; and in furtherance of this object, they settle and adjust, in a single suit, rights and interests, which, in courts of law, result in various issues incapable of trial in one action. *Fellows v. Fellows*, 412.
3. RESCINDING CONTRACT IN EQUITY.—If a person deeply in debt, to obtain a loan, agrees to purchase a tract of land at more than double its value, and gives a mortgage upon other property to secure the loan and a part of the purchase-money, the vendor being apprised of the purchaser's necessities, equity will rescind the contract. *Hough v. Hunt*, 569.
4. *Idem*.—Equity will, at the instance of heirs, relieve against a contract of sale of realty made by their ancestor if it appears that while not, strictly speaking, a *non compos mentis*, he was a man of weak mind, and that the consideration was so grossly inadequate as to leave no doubt that he must have acted under the influence of some strange delusion. *Holden v. Crawford*, 700.
5. *Idem*.—Equity will not rescind every contract of which it would refuse a decree of specific performance. *Thompson v. Jackson*, 720.
6. To RESCIND AN EXECUTED CONTRACT, in equity, fraud or mistake must appear; mere failure of consideration, arising from the sale of a defective title, unmingled with fraud or *mala fides*, is not sufficient. *Id.*
7. MISTAKE AS TO THE NUMBER OF ACRES OF LAND PURCHASED, where the purchaser obtain the substance of what he expected, will not justify a court of equity in rescinding the contract. *Id.*
8. WHERE TWO PURCHASE LAND JOINTLY, one of them advancing most of the purchase-money, under an agreement that if the land is sold, he is to have half the proceeds, or that he is to be repaid his advances, and that the other may keep the land, and the latter takes the title in his own name, the former has a lien on the land for his advances. *Hays v. Wood*, 754.
9. EQUITY HAS JURISDICTION TO MAKE A PERSONAL DECREE in such a case if the party does not ask that the land be subjected to the payment of the money. *Id.*
10. CONCURRENT JURISDICTION IN CASE OF ACTUAL FRAUD.—In cases of actual fraud, equity has concurrent jurisdiction with the courts of law and following the law, will give relief to the same extent. Hence, a conveyance tainted with actual fraud, of which the grantee had notice, will be set aside *in toto* in equity at the suit of the creditor. *Garland v. Rives*, 756.
11. THE MAXIM THAT HE WHO SEEKS EQUITY must do equity applies only to equities between the parties, and not to an equity between the plaintiff and a third person. *Id.*
12. JUDGMENT AS EVIDENCE IN EQUITY.—Where a judgment-creditor comes into equity to enforce his judgment, such judgment is *prima facie* evidence, as against strangers claiming under the debtor, that he is a debtor, and to impeach it they must show fraud, or that a full defense was not made, or produce new proof that the debt is not due. *Id.*

See BOUNDARIES, 6; ESTOPPEL, 1; IMPROVEMENTS, 2; JUDGMENTS, 1, 2, 3.

ESTATES OF DECEASED PERSONS.

1. **DEBTS OF TESTATOR** may be directed to be paid by his legatees, ratably according to the amount received by each. *McC Campbell v. McC Campbell*, 48.
2. **PERSONAL ESTATE** is the proper fund for the discharge of all debts and legacies, which the will does not make chargeable on real estate. *Id.*
3. **CHARGING DEBTS ON LAND.**—A provision in a will giving the testator's wife "the free and uninterrupted possession of the mansion-house, plantation and stock, and profits thereto belonging. Next, all lawful, just debts discharged," does not charge the land with the payment of the debts. *Id.*
4. **IN MARSHALING ASSETS** for the payment of debts of a decedent, the following order should be observed: 1. The general personal estate; 2. Estate specifically devised to be sold; 3. Estate descended; and, 4. Estate specifically devised, though charged generally with the payment of debts. The second and third rules change places where the estate set apart for the payment of debts is charged generally, and not specially. *Id.*
5. **SETTLEMENTS OF THE COUNTY COURT WITH EXECUTORS** are evidence between the parties of the amount of the debts. *Id.*

ESTOPPEL.

1. **IN EQUITY.**—A question tried in a court of law, having jurisdiction, will not be re-tried in equity in a suit between the same parties. *McC Campbell v. McC Campbell*, 48.
2. **ARISING FROM CONVEYANCES OF BARGAIN AND SALE** result entirely from the matters of fact affirmed in the deed. *Taylor v. Shufford*, 512.
3. A **REBUTTER** operates on the right of action to an estate, while an estoppel operates entirely on facts. *Id.*
4. **ESTOPPELS RESULTING FROM VARIOUS CONVEYANCES** considered and explained. *Id.*
5. **MISREPRESENTATIONS AT EXECUTION SALE** made by the defendant to the effect that a certain tract of land was included in the levy, whereby an innocent purchaser was induced to bid on the theory that such land was embraced in the sale, will give the purchaser a good title in equity, though the land was not included in the levy; and, after the execution of the deed, the defendant is not entitled to have the sale vacated on repaying the purchaser the amount of his bid and all expenses. *Buchanan v. Moore*, 601.

See JUDGMENTS, 19, 24, 25; SOVEREIGNTY, 4; SURETYSHIP, 2.

ESTRAYS.

See TRESPASS.

EVIDENCE.

1. **IMMATERIAL EVIDENCE** is properly rejected. *Loftand v. Ewing*, 41.
2. **PAROL EVIDENCE** is not admissible where there is no suggestion of fraud or mistake, to show that an absolute bill of sale was intended as a mortgage. *Thompson v. Patton*, 44.
3. **JUDGMENT IN FORCIBLE ENTRY AND DETAINER** is not evidence of title in an action of ejectment. *Mattor v. Helm*, 64.

4. LAWS OF OTHER STATES must be proved as facts. *Scott v. Coleman*, 71.
5. IMPEACHING A WITNESS.—To impeach a witness, it is proper to inquire what is his general character, as well as to inquire whether he is entitled to credit upon oath. *Blue v. Kibby*, 95.
6. BANK BOOKS—EVIDENCE.—Entries in the books of bankers are evidence to show receipts and payments of money in an action against a depositor for overdrawing. If the clerk who made the entries is dead or insane, or out of the jurisdiction of the court, the books may be admitted on proving his handwriting. *Union Bank v. Knapp*, 182.
7. EXCLUSION OF WITNESS.—A clerk of the bank who is supposed to have made a mistake, through which a depositor was enabled to overdraw, is not, on that account, incompetent to be a witness for the bank in an action against the depositor. *Id.*
8. EVIDENCE TO SHOW WHAT HAS BEEN ADJUDICATED.—Evidence, extrinsic the record, is admissible to show what matters, embraced within the issues, were passed upon in a former action. *Gardner v. Buckbee*, 256.
9. HEIRS OR DEVISEES are not affected by the admission of executors; hence a petition verified by the executors is not admissible as against the heirs to prove the facts therein stated. *Osgood v. Manhattan Co.*, 304.
10. JUDGMENTS AGAINST EXECUTORS are not evidence against heirs. *Id.*
11. CUMULATIVE EVIDENCE improperly admitted is good ground for reversal. *Id.*
12. ADMISSIONS by one man are not evidence against another unless they have a joint interest. *Id.*
13. DECLARATIONS of a grantor after executing a conveyance, are not admissible to the prejudice of his grantee. *Id.*
14. PUBLIC STATUTES are judicially noticed. *People v. Herkimer*, 379.
15. OPINIONS OF WITNESSES are admissible in an action for breach of marriage contract, if founded upon observation, to show whether plaintiff was attached to defendant. *McKee v. Nelson*, 384.
16. WANT OF CHASTITY, or other immoral conduct, on the part of the plaintiff, may be shown by the defendant in an action for breach of contract to marry. *Id.*
17. PAROL EVIDENCE OF THE CONTENTS OF A WILL is inadmissible, unless it is first shown that diligent and unavailing search has been made for the original, by or at the request of the party interested, and in the place where it is most likely to be found. *Dan v. Brown*, 395.
18. ADMISSIONS MADE BY ONE PLAINTIFF are not evidence against his co-plaintiffs who claim as tenants in common with him. *Id.*
19. THE LOSS OF A PAPER OR THE DEATH OF A WITNESS may, for the purpose of laying the foundation for secondary evidence, be proved by a witness interested in the cause, or even by one of the parties. *Jackson v. Davis*, 451.
20. AN OBJECTION TO THE ADMISSION OF EVIDENCE, not taken, or, if taken, not persisted in at the trial, can not be taken on appeal, if it was of such a character that further evidence might remove it. *Id.*
21. AN ANCIENT DEED, more than thirty years old, may be read in evidence without proof of its execution, if it be first shown that possession of part of the premises conveyed was taken and held under it, though such part does not include the lands in controversy. *Id.*

22. **ADMISSIONS AND DECLARATIONS OF PERSONS IN POSSESSION** of lands are evidence against their successors in interest. *Id.*
 23. **REGISTERS OF BIRTHS, MARRIAGES AND BURIALS** are competent evidence to prove pedigree, and when the original is of a public nature, and is admissible, an examined copy is equally admissible. *Jackson v. King*, 468.
 24. **HEARSAY IN THE FAMILY** and among relations, tradition and anything showing general reputation, may be admitted as evidence of pedigree. *Id.*
 25. **IDENTITY OF PERSON** is presumed from identity of name. Hence, if plaintiff shows a patent to A., and then establishes his descent from a person named, it need not prove that his ancestor and the patentee are the same person. The burden of showing that they were different persons rests on the defendant. *Id.*
 26. **IF EVIDENCE BE OFFERED FOR ONE PURPOSE** and rejected, the lower court will be sustained, though the evidence is admissible for another purpose than the one for which it was offered. *Sickman v. Lapsley*, 596.
 27. **EVIDENCE** showing that a testator who has long been dead left considerable personal property is admissible to raise a presumption that legacies charged upon his real and personal estate have been paid. *Fuhrman v. Loudon*, 608.
 28. **DECLARATIONS OF A DECEASED PERSON** who was in a situation to possess the information are admissible on questions of boundary if made before the commencement of the suit. *Coate v. Speer*, 627.
 29. **DECLARATIONS OF A PARTY** may be evidence for himself, as a part of the *res gesta*, when they accompany and explain his actions, at a time when he could not have anticipated the circumstance which makes the declarations material. *Ross v. Bank of Burlington*, 664.
 30. **STREETS, LOCATION OF.**—Ancient reputation and possession, in respect to the location of streets, are entitled to more respect, in determining the boundaries of lots, than any experimental survey that can now be made. *Ralston v. Miller*, 703.
- See **ASSIGNMENTS**, 2; **BOUNDARIES**, 4; **EQUITY**, 12; **ESTATES OF DECEASED PERSONS**, 5; **FRAUDULENT CONVEYANCES**, 2; **WILLS**, 5.

EXECUTIONS.

1. **JUSTIFICATION BY OFFICER.**—An officer, sued for taking property, may justify by showing an execution against his adversary which is regular upon its face. *Clay v. Caperton*, 77.
2. **AN EXECUTION IRREGULARLY ISSUED** to another county is voidable only. A sale under it is valid. *Cox v. Nelson*, 89.
3. **PURCHASERS AT EXECUTION SALES** are not bound by the irregular acts of the officer or plaintiffs in which they do not participate. *Id.*
4. **THE QUASHING OF AN EXECUTION** irregularly issued does not invalidate a sale previously made under it. *Id.*
5. **LEASE BY DEFENDANT AFTER EXECUTION.**—A purchaser under execution can recover the land notwithstanding a lease made by the defendant after the levy. *Locke v. Coleman*, 118.
6. **TENANT NOT ENTITLED TO NOTICE.**—The tenant under such a lease does not hold under the purchaser, and is not entitled to notice to quit. *Id.*
7. **DELAY IN SELLING AFTER LEVY** of an execution does not destroy the lien. *Id.*

8. **MAKING A SINGLE SALE UNDER DISTINCT EXECUTIONS**, if it be an irregularity, does not affect the purchaser's right of recovery. *Id.*
9. **ASSIGNMENT OF EXECUTION TO OFFICER**.—That one of the executions under which a sale was made was assigned to the deputy making the sale does not affect the purchaser. *Id.*
10. **UPON THE DEATH OF A DEFENDANT IN EXECUTION** the sheriff can not proceed without a revivor, even where a levy has been made, and if he does so, the execution may be quashed and restitution ordered. *Bristow v. Patton*, 134.
11. **MOTION TO QUASH BARRED BY LAPSE OF TIME**.—A motion to quash an execution, for an irregularity in enforcing it without a revivor, after the defendant's death, must be made in reasonable time, or it will be barred; eleven years is not a reasonable time for such purpose. *Id.*
12. **LAPSE OF TIME** is always regarded upon an application merely to correct irregularities, and not to promote substantial justice. *Id.*
13. **SENDING AN EXECUTION TO ANOTHER COUNTY** than that in which judgment is recovered, in cases not provided for by statute, is an erroneous proceeding. *Sanders v. Buddle*, 148.
14. **A SALE UNDER AN EXECUTION SO SENT** to another county is voidable, but not void, its validity depending on the purchaser having or not having notice of the irregularity. *Id.*
15. **WHERE THE PLAINTIFF BECOMES A PURCHASER** at such sale, having a reasonable opportunity to know of the irregularity, the sale is invalid, and will be quashed. *Id.*
16. **A PARTNER OF THE PLAINTIFF IN SUCH PURCHASE** is affected with the latter's notice of the irregularity, and the consequences as to both are the same. *Id.*
17. **PLAINTIFF PROCURING LEVY ON STRANGER'S PROPERTY**.—A plaintiff in execution procuring a levy to be made on a stranger's goods is guilty of a conversion, whether he takes possession or not. *Hale v. Amer*, 150.
18. **A SHERIFF'S DEED RELATES BACK** to the day of the sale, and may, therefore, be given in evidence, in an action of ejectment, under the general issue, though executed after issue joined. *Jackson v. Ramsay*, 242.
19. **STAY OF EXECUTION** results from filing writ of error with the clerk, if bail be in. *Van Antwerp v. Newman*, 340.
20. **EXECUTION WRONGLY TESTED** as to the name of the chief justice, is not void; but is amendable, and the sheriff can not avail himself of the irregularity. *Ross v. Luther*, 341.
21. **LEVY ON PERSONALTY** sufficient to satisfy a writ of execution extinguishes the judgment, destroys the judgment lien, and terminates the judgment-creditor's right to redeem the property of his debtor. *Ex parte Lawrence*, 386.
22. **PURCHASER AT EXECUTION SALE, WHAT HE MUST PROVE**.—If real property is sold under execution, against a party not in possession, the purchaser can not recover in ejectment, against one found in possession, without showing that the defendant in execution had some interest in the premises or some right to the possession thereof. It is not sufficient to establish that he was in possession for a period of less than twenty years, but abandoned it before judgment, though after so abandoning he conveyed to the defendant in ejectment. *Jackson v. Town*, 405.

23. JUDGMENT-LIEN attaches only to a legal or equitable seisin, and if defendant has neither, an execution sale transfers nothing. *Id.*
24. PURCHASERS AT EXECUTION SALES are within the protection of the registry acts. *Id.*
25. OMISSION TO FILE CERTIFICATE OF SALE under execution does not prejudice the purchaser. The statute is directory merely. *Jackson v. Young*, 473.
26. LEVY ON CHATTELS vests a special property in the sheriff, by virtue of which he may retain them, and make a sale after the return-day. *Barden v. McKinnie*, 519.
27. LEVY ON LANDS does not vest title in the sheriff, or give him any right of possession. *Id.*
28. AFTER THE RETURN-DAY of an execution, lands can not be sold under it, though levied upon before. *Id.*
29. PURCHASER OF LAND AT SHERIFF'S SALE is not thereby in actual or constructive possession, and, therefore, can not sustain an action of trespass for the crops where he does not obtain possession by ejectment. *Beggs v. Thompson*, 539.
30. DEATH OF DEFENDANT IN EXECUTION, after it has issued and been levied, does not prevent the officer from proceeding; but if defendant die after execution sued out, and before levy, the execution can not proceed, and any sale thereafter made is void. *Massie's Heirs v. Long*, 547.
31. DEFENDANT ARRESTED UNDER EXECUTION for a fine may surrender land, and thereby obtain his discharge. *Waleh v. Ringer*, 555.
32. LAND SURRENDERED by defendant in discharge of his body in execution for a fine, may be sold without valuation. *Id.*
33. EXECUTION PREMATURELY ISSUED on an existing judgment, though erroneous, is not void. It can not be collaterally attacked by another execution-creditor, who sues the sheriff for the proceeds. *Stewart v. Stocker*, 589.
34. PROPERTY SUBJECT TO.—A TURNPIKE ROAD is not the subject of levy under execution, where the defendant has no interest in the land, and no right save that of maintaining the road and receiving tolls. *Amman v. New Alexandria etc. Road*, 593.
35. QUASHING LEVY.—If intangible property not subject to execution be blended in a levy with other property, so that it is difficult to separate them, the whole levy may be quashed. *Id.*
36. BREAKING OPEN DOORS of a dwelling-house to levy an execution upon the owner, or one of his family, or upon his or their goods, is a trespass; but demand being first made and refused for the opening of the doors, the house may be broken into to levy a writ, or to retake goods belonging to another than the owner of the house, or the members of his family. *De Graffenreid v. Mitchell*, 648.
37. EXEMPTION FROM EXECUTION of articles "necessary for upholding life," entitles the judgment-debtor to his cooking-stove; it is not an article of ornament or luxury. *Crocker v. Spencer*, 652.
38. EXECUTION FOLLOWS AS A MATTER OF COURSE from the judgment, and need not be specially awarded by the court; but when the clerk enters the judgment, technical form requires him to add "whereof he may have execution." *Little v. Cook*, 698.

39. IF PROCEEDINGS UNDER AN EXECUTION ARE WHOLLY VOID, a purchaser gets no title, and as the defendant may have redress by an action of detinue, equity has no jurisdiction. *Hamilton v. Shrewsbury*, 779.
40. WHERE A LEVY IS SO FAR VALID as to bind the property, but the sale is void on account of interest, or improper conduct in the officer, the court issuing the execution may give redress by quashing such execution, etc., and, therefore, there is no jurisdiction in equity. *Id.*
41. PROPERTY NOT BEING PRESENT AT A SALE ON EXECUTION is not sufficient, of itself, to vacate the sale, but for any improper conduct of the sheriff in this respect or otherwise, the party injured may have an action against him. *Id.*
42. A BONA FIDE PURCHASER UNDER AN EXECUTION, having no notice of any misconduct of the officer, will not be prejudiced by such misconduct, but will get a good title. *Id.*

See EJECTMENT, 1; ESTOPPEL, 5; FRAUDULENT CONVEYANCES, 13.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTOR, WHAT CHARGEABLE WITH.—In this case the executor was not charged with the amount of the inventory, but only for the property which came into his hands, and was applied to his own use. *McC Campbell v. McC Campbell*, 48.
2. PURCHASES BY ADMINISTRATORS in the proceedings prosecuted by them in their official capacity are held by them as trustees; the *cestuis que trust*, are entitled, if they so elect, to the benefit of the purchases. *Fellows v. Fellows*, 412.

See ESTATE OF DECEASED PERSONS; LEGACIES, 3;

FEMES-COVERT.

WIFE, SUIT BY OR AGAINST.—A wife can not, on account of having a separate maintenance, or of the temporary absence of her husband, or of her separation from him, sue or be sued alone. She may, however, sue or be sued alone when the husband is in law *civilliter mortuus*, or is an alien who has never resided in this government, or where he is exiled or banished for life or has abjured the realm. *Robinson v. Reynolds*, 672.

See ARREST.

FORCIBLE ENTRY AND DETAINER.

See EVIDENCE, 3.

FRAUD.

1. FRAUD in procuring a conveyance from a person of weak understanding is a good ground for relief in equity. Relief may, in some cases, be obtained at law, where the fraud is clearly established. *Jackson v. King*, 354.
2. FRAUD—LAW AND EQUITY.—The distinction between legal and equitable jurisdiction upon fraud is this: that at law it must be proved, not presumed, while in equity it may be presumed from the nature of the transaction, the situation of the parties, and other circumstances. *Id.*
3. PURCHASER PENDING A SUIT for the fraudulent purpose of defeating the object of it, is bound by the judgment rendered, equally with the debtor. *Garland v. Rives*, 756.

See EQUITY, 10; LANDLORD AND TENANT, 3.

FRAUDULENT CONVEYANCES.

1. CREDITOR'S BILL, to vacate fraudulent conveyances, can not be sustained unless complainant is a creditor by a judgment. *Allen v. Ward*, 109.
2. FRAUDULENT SALE—EVIDENCE OF.—The acts and declarations of a vendor, after a sale, though not in the presence of the vendee, are admissible in evidence to show fraud in the former, but not to show fraud in the latter. *Martin v. Reeves*, 154.
3. RETENTION OF POSSESSION by a vendor or mortgagor of goods is *prima facie* though not conclusive evidence of fraud. It may be explained, by showing that the sale was *bona fide* for a valuable consideration, and that the vendor continued in possession in pursuance of some agreement consistent with an honest transaction. *Bissell v. Hopkins*, 259.
4. VOLUNTARY DEED is good between the parties and against the heirs of the grantor. *Jackson v. King*, 354.
5. VOLUNTARY DEED founded on love and affection is good against creditors unless the grantor was, at the time, in doubtful or insolvent circumstances. *Jackson v. Towne*, 405.
6. AN ASSIGNMENT IN TRUST FOR CREDITORS, providing that the assignees shall pay a certain sum per annum for the support of the assignor's family until he should be discharged from his debts, and not to exceed four years, is void as against any creditors who object thereto. *Mackie v. Cairns*, 477.
7. PARTIAL RESERVATION FOR THE BENEFIT OF THE ASSIGNOR, would not, at common law, annul the whole deed, though it might be avoided as constructively fraudulent. (*Per SUTHERLAND, J.*) *Id.*
8. A JUDGMENT GIVEN TO DELAY OR DEFRAUD creditors, is void as against them. *Id.*
9. A JUDGMENT CONFERRED BY AN ASSIGNOR, to be used only in the event that an assignment made by him is not sustained, is itself void if the assignment was made to hinder, delay or defraud creditors. *Id.*
10. PARTIES TO A FRAUDULENT CONVEYANCE will not be permitted to deny its validity. *Id.*
11. FRAUDULENT DONOR OR VENDOR will not be permitted to set up his own iniquity to avoid his own act or deed. Fraud is irrevocable as to him who commits it. *Sickman v. Lapsley*, 595.
12. RETENTION OF POSSESSION OF CHATTELS by a vendor is a fraud in law, and makes the sale void as against creditors. *Boardman v. Keeler*, 670.
13. RETENTION OF POSSESSION BY DEFENDANT in execution, after a sale of chattels by the sheriff, is not a fraud in law, and will not vitiate the purchaser's title. *Id.*
14. A CONVEYANCE TO SECURE A JUST DEBT WILL BE FRAUDULENT and void if it contain provisions to delay, hinder or defraud other creditors. *Garland v. Rives*, 756.
15. GRANTEE IN SUCH CONVEYANCE, HAVING NOTICE of the fraudulent provisions contained in it, is not a *bona fide* purchaser, notwithstanding the fact that his only motive was to secure the payment of his own debts, and that such fraudulent provisions were forced upon him as the only means of obtaining payment. *Id.*
16. TO VITIATE A CONVEYANCE under the statute, there must be a fraudulent design in the grantor and notice of it in the grantee. *Id.*

See BONA FIDE PURCHASERS.

GAMING.

MONEY LOST AT GAMING, whether by fair play or foul, can not be recovered by the loser, nor by his executor or administrator, unless a remedy is given by statute. *Babcock v. Thompson*, 235.

GENERAL AVERAGE.

See **INSURANCE**, 3.

GIFTS.

PRESUMPTION OF GIFT arises from a parent's suffering property to go into possession of a child upon its marriage. *De Graffenreid v. Mitchell*, 646.

GUARANTY.

1. **PROMISES TO ANSWER FOR THE DEBT OF ANOTHER** classified, and each class considered with respect to the statute of frauds. *Furley v. Cleveland*, 387.
2. **PROMISE TO PAY THE DEBT OF ANOTHER** is, if founded on a new consideration of benefit to the promisor or harm to the promisee, moving from either the promisee or the original debtor, not within the statute of frauds. *Id.*
3. **PROMISE TO PAY DEBT OF ANOTHER** is valid, although the promisor derives no advantage or benefit; it is sufficient that the promisee suffers a damage, or forbears to prosecute a claim, or delays an arrest of the debtor. *Barnstine v. Eggart*, 625.

GUARDIAN AND WARD.

1. A **GUARDIAN AND THE SURETIES** on his bond may be joined as defendants in an action by the ward for an accounting, and two or more wards may join as plaintiffs in such an action. *Hutchcraft v. Skrouf's Heirs*, 100.
2. **GUARDIAN'S BONDS**.—Where two bonds were given by the same guardian, at different times, all the sureties on both bonds were held liable for the whole amount. *Id.*
3. **NON-JOINDER OF PARTIES**.—In a suit by a ward against his guardian and securities, all the sureties who are living, and the representatives of those who are dead, must be made parties. *Id.*

HUSBAND AND WIFE.

See **ADVERSE POSSESSION**, 6; **ALIMONY**; **CHAMPERTY**, 7; **COURTESY**; **JOINT-TENANCY**; **SLANDER**, 3.

IMPEACHMENT.

See **CONSTITUTIONAL LAW**, 4.

IMPROVEMENTS.

1. **COMPENSATION FOR IMPROVEMENTS ON EVICTION IS ALLOWED**, where they have been made in good faith, because, though in law they belong to the owner of the estate, in equity and conscience, they belong to him who made them. *Pugh v. Bell*, 142.

2. IMPROVEMENTS MADE BY A PURCHASER WITH NOTICE of an equitable title, can not be made the subject of compensation, where such purchaser is the complainant; but if the owner comes into equity for relief he must do equity by making compensation for such improvements, for his gain and the defendant's loss by the improvements are the same as if they were made without notice. *Id.*
3. THE VALUE OF THE IMPROVEMENTS at the time of eviction, is the measure of compensation, and interest has no place in the computation. *Id.*
4. THE VALUE OF PERMANENT IMPROVEMENTS made by an occupant under a *bona fide* purchase may be allowed in an action for mesne profits, to the extent of the rents and profits due to plaintiff. *Jackson v. Loomis*, 347.

See VENDOR AND VENDEE, 1.

INFANCY.

1. INFANT'S CONTRACT TO MARRY an adult is voidable at the election of the infant, but not void. The infant may maintain an action for a breach of the contract, while the adult can not. *Hunt v. Peake*, 475.
2. CONTRACT MADE BY AN INFANT AND AN ADULT is binding on the latter only, against whom alone an action can be sustained. *Hull v. Connolly*, 612.
3. INFANT'S CONTRACT FOR NECESSARIES can not be enforced if he was living with and properly maintained by his parents, or either of them. In such case the parent is presumed to be a proper judge of what is necessary for the infant. *Id.*

See PARENT AND CHILD.

INJUNCTIONS.

1. INJUNCTION TO PREVENT COLLECTION OF PURCHASE-PRICE of real estate will not be sustained where the title of the purchaser is neither threatened by suit nor clearly shown to be defective. *Ralston v. Miller*, 704.
2. EQUITY MAY PREVENT A THREATENED INJURY, such as the obstruction of one's right to the flow of water in a stream, but after the wrong is done the remedy is at law by way of damages. *Coalter v. Hunter*, 726.

INSANITY.

1. ONUS OF PROOF OF INSANITY is upon him who alleges it, or seeks to avoid an act on account of it; but if general derangement be once shown, the burden of proof is shifted to him who asserts that the act was done in a lucid interval. *Jackson v. King*, 354.
2. AN INSANE PERSON is one who, having once had understanding, has wholly lost it. *Id.*
3. IMBECILITY OR WEAKNESS OF UNDERSTANDING, not amounting to idiocy nor lunacy, is not sufficient to avoid a deed at law, though the grantor may have been a fit subject for a commission in the nature of a writ *de lunatico inquirendo*. *Id.*
4. THE VALIDITY OF A DEED is not affected by a commission subsequently adjudging the grantor to be an imbecile. *Id.*
5. WEAKNESS OF UNDERSTANDING, even when not sufficient to avoid a deed at law, may furnish strong ground to suspect fraud and imposition. *Id.*

INSOLVENCY.

See BANKRUPTCY.

INSURANCE—MARINE.

1. AN INSURER OF A VESSEL is not at liberty to show that she had received part of the injury before the voyage, unless she was in fact unseaworthy. *Depas v. Ocean Ins. Co.*, 431.
2. ABANDONMENT BY ASSURED.—The assured can not abandon after the vessel has been repaired and is successfully pursuing her voyage. *Id.*
3. A GENERAL AVERAGE FAIRLY SETTLED, in a foreign port of destination, though not a port of necessity, is conclusive between the assured and the underwriters. *Id.*
4. INSURANCE.—If the assured undertake to state all the circumstances which can affect the risk, he must do so fully and fairly. He will not be permitted to excuse himself by saying that he failed to communicate a fact, because it was already known to the insurer. *Stoney v. Union Ins. Co.*, 634.

INTEREST.

1. INTEREST may be allowed an executor on sums advanced by him. *McCampbell v. McCampbell*, 48.
2. INTEREST ALLOWED AGAINST A GARNISHEE, where he withheld more money from his creditor than was necessary to discharge the garnishment. *Sickman v. Lapsley*, 596.

See SHERIFFS, 5.

INTERVENTION.

INTERVENOR, JURY TRIAL.—An intervenor is entitled to a jury trial, though none is demanded by the plaintiff or defendant. *Lacroix v. Menard*, 161.

INTOXICATION.

See SPECIFIC PERFORMANCE, 7.

JOINT-TENANCY.

1. JOINT-TENANCY does not exist in Ohio. *Sergeant v. Steinberger*, 553.
2. IF A DEVISE BE MADE TO HUSBAND AND WIFE, they take as tenants in common. *Id.*

JUDGMENTS.

1. RELIEF IN EQUITY.—A court of equity has no power to set aside a judgment at law; it must act on the person only, and not on the common law proceedings. *Yancey v. Downer*, 35.
2. RELIEF IN EQUITY AGAINST A JUDGMENT WILL BE GRANTED, where by fraud or by an artful contrivance, or by any unavoidable accident a valid defense is kept out of sight. *Id.*
3. RELIEF IN EQUITY AGAINST A JUDGMENT WILL BE DENIED, unless it appears that it was out of the power of the applicant to make his application to the court of law in due time. *Id.*
4. A JUDGMENT ENTERED IN ANOTHER STATE is entitled to full faith and credit here; but in no case is it to be given any greater effect here than it has at home. *Scott v. Coleman*, 71.

5. **IT IS PRESUMED IN SUPPORT OF JUDGMENT OF ANOTHER STATE**, that the court had jurisdiction, and that the parties are concluded by its adjudication. *Id.*
6. **ONUS OF IMPRACHING** a judgment rendered in another state, is on him who seeks to resist it. *Id.*
7. **AMENDMENT OF JUDGMENT** may be made in the lower court pending a writ of error. *Speed v. Hann*, 78.
8. **JUDGMENT AGAINST EXECUTORS** upon a covenant of their testator should be entered *de bonis testatoris* and not *de bonis propriis*. *Id.*
9. **AMENDMENTS, WHEN MAY BE MADE**.—A judgment can not be amended for error of the court after the lapse of the term; but clerical errors in its entry may be corrected at any time. *Id.*
10. **CORRECTING CLERICAL ERRORS**.—An error in entering a judgment *de bonis propriis*, instead of *de bonis testatoris*, is a clerical error which the court may order corrected at any time. *Id.*
11. **ARREST OF**.—If, in an action on a bond, there be several breaches assigned, and some of such assignments are insufficient, and a general verdict be rendered, the judgment will be arrested. *Bank of Carlisle v. Hopkins*, 113.
12. **FORM OF**.—A judgment in favor of "Joseph Fountain's heirs," without naming them, is not void. *Shackleford v. Fountain*, 115.
13. **A DECREE WILL NOT BE OPENED TO TAKE NEW TESTIMONY** as to the ages of the complainants who lived in the defendant's neighborhood. *Pugh v. Bell*, 142.
14. **NULLITY OF JUDGMENT**.—The failure to give the reasons on which a judgment is founded is a relative nullity only. *Whitehurst v. Hickey*, 167.
15. **REVERSAL OF A JUDGMENT** appointing a syndic does not operate retrospectively, and avoid his acts done while the judgment was in force. *Saulet v. Dreux*, 173.
16. **JUDGMENT AGAINST A CONSUL** of a foreign nation upon default is valid. His not appearing and pleading to the jurisdiction of the court, is a waiver of the want of jurisdiction over him. *Hall v. Young*, 180.
17. **AN ORDER OF COURT** on a motion or summary application is not technically *res judicata*, but the same matter will not be twice heard without good cause shown. *Chichester v. Cande*, 238.
18. **NUNC PRO TUNC FILING**.—Where there were judgment and execution against a party, but by accident the record was not filed, it was, on motion, allowed to be filed *nunc pro tunc*, so that the execution should retain its priority over another writ subsequently issued and levied. *Id.*
19. **JUDGMENT, ESTOPPEL BY**.—The judgment of a court of concurrent jurisdiction, directly upon the point is, as a plea in bar or evidence, conclusive between the same parties upon the same matter directly in question in another suit. *Gardner v. Buckbee*, 256.
20. **JUDGMENT RENDERED IN ANOTHER STATE** may be avoided in an action thereon, by showing that the court had no jurisdiction of the person of the defendant, or of the subject of the action. *Shumway v. Stillman*, 374.
21. **JURISDICTION** of the court of record of another state in which the judgment was entered is presumed. *Id.*
22. **JURISDICTION, WANT OF, HOW PLEADED**.—In an action on a judgment entered in another state, it is not sufficient to plead that the defendant

- was never an inhabitant or resident of such state; the plea must further show that he did not appear in, or defend, the suit, or otherwise subject himself to the jurisdiction of the court. *Id.*
23. **NUL TIEL RECORD** is the only plea of the general issue applicable to a declaration on a judgment of a court of record of another state. *Id.*
24. **JUDGMENT ESTOPPEL**.—The judgment of a court of concurrent jurisdiction directly upon the point, is as a plea a bar, or as evidence conclusive between the same parties upon the same matter, directly in question in another action. *Burt v. Sternburgh*, 402.
25. **ESTOPPEL OF JUDGMENT** results not from the recovery, but from the matter alleged by the party and upon which the recovery proceeded. *Id.*
26. **JUDGMENT IN TRESPASS QUARE CLAUSUM FREGIT** in favor of plaintiff is, in a subsequent action against the same defendant for trespass on the same premises, conclusive evidence of the plaintiff's title, where such title was drawn in question and litigated in the former suit. The defendant is, however, entitled to show that he has acquired title since the former action, or that plaintiff's title has terminated. *Id.*
27. **NUNC PRO TUNC ENTRY** of judgment, as of a date prior to the death of one of the defendants may be ordered, so as to avoid an error in fact for which a writ of error has been prosecuted. *Wilson v. Myers*, 510.
28. A **JUDGMENT AGAINST** one of several joint trespassers is not, unless satisfied, a bar to an action against the others. *Wright v. Lathrop*, 529.
29. **NUNC PRO TUNC ENTRY** of judgment, after a year and a day, will be granted or refused at the discretion of the court. It will be refused unless: 1. Good reason for the delay is shown; and, 2. The rights of strangers shall not be affected. *Galpin v. Fishburne*, 614.
- See **ATTACHMENTS**, 2; **EQUITY**, 12; **EVIDENCE**, 3, 8, 10; **FRAUDULENT CONVEYANCES**, 8, 9.

JUDICIAL SALES.

See **EXECUTIONS**.

JURISDICTION.

1. **REDUCING DEMAND**.—The plaintiff can not, without consent of defendant, give him a credit so as to reduce the demand within the summary process jurisdiction, or within the jurisdiction of an inferior court. *Bent v. Graves*, 632.
2. **CONSENT OF PARTIES** can not confer where it is denied by law. *Id.*
See **ATTACHMENTS**, 5; **EQUITY**, 10; **JUDGMENTS**, 5, 16, 20, 21, 22.

JURY.

1. **JURORS**.—Circulating spirituous liquors among the jurors, even by the consent of the parties, is a fatal error, for which the judgment must be set aside. *Rose v. Smith*, 331.
2. **JURY, MISCONDUCT OF**.—The mere separation of a jury, contrary to the direction of the court, is not a sufficient cause for setting aside a verdict; but if, during the progress of the trial of an indictment for murder, two of the jurors separate from their fellows, go to their lodgings, drink spirituous liquors, though not enough to affect them, and one of them converses on the subject of the trial, a new trial must be granted. *People v. Douglass*, 332.

3. THE MERE DRINKING OF SPIRITUOUS LIQUORS by the jurors is enough to set aside the verdict. *Id.*

LANDLORD AND TENANT.

1. IN EJECTMENT BY A LANDLORD AGAINST HIS TENANT, who holds over after the term has expired, the former may rely on the lease, and need show no other title. *Mattox v. Helm*, 64.
2. WRIT OF POSSESSION MAY BE EXECUTED by turning out all tenants at will or sufferance, whether they entered before or after the commencement of the action. *Id.*
3. LEASE OBTAINED BY FRAUD is void. *Id.*
4. THE RELATION OF LANDLORD AND TENANT, once established, attaches to all who succeed to the possession through or under the tenant, immediately or remotely. *Jackson v. Davis*, 451.
5. THE GRANTEE OF A TENANT, though he received a deed absolute, enters, in contemplation of law, as tenant of the lessor. *Id.*
6. NON-PAYMENT OF RENT, or failure to demand rent, for twenty years, does not create a presumption of the conveyance or extinguishment of the landlord's title. *Id.*
7. PAROL DISCLAIMER OF TITLE TO REAL PROPERTY can not be received in evidence to destroy or take away a title. *Id.*
8. A TENANT'S CONVEYANCE IN FEE is a disseisin of the landlord, or not, at the election of the latter. *Id.*
9. DISSEISIN BY TENANT.—A tenant can not, against the will of his landlord, constitute himself a disseisor. *Id.*
10. ASSIGNEE OF LEASE.—If a lessee assigns his lease for a shorter period of time than that for which it was granted, or if he assign or underlet as to part only of the premises, the lessor can not sustain an action against the assignee or sub-lessee for rent. *Fulton v. Stuart*, 542.
11. HOLDING OVER BY A TENANT.—If a tenant holds over after the first year, the law usually implies an agreement by him to pay the same rent, and at the same time, as before; but no such agreement can be implied where the lease contains many collateral stipulations which could not be performed in the second year. *Diller v. Roberts*, 578.
12. DISTRESS.—To entitle a landlord to a distress, there must be a reservation of a certain rent. *Id.*
13. DISTRESS can not be made by a landlord after his title has terminated. *Lichtenthaler v. Thompson*, 581.
14. TENANT AND SUB-TENANT must deliver up possession to the landlord before either can assert an outstanding title or one purchased by him. *Blake v. Howe*, 681.

LEASES.

See LANDLORD AND TENANT.

LEGACIES.

1. LEGATEES who have received general or specific legacies from the personality, must refund the whole thereof, if necessary for the payment of debts, before resort can be had to real property. *McC Campbell v. McC Campbell*, 48.
2. LEGACIES CHARGED UPON THE ISSUE OF LANDS DEVISED, stand on the same footing as land when called to contribute to the payment of debts;

and, in such cases, the legatees and the devisees of the land must contribute ratably, according to value. *Id.*

3. **EXECUTOR'S RIGHT TO REFUNDING OF MONIES PAID BY MISTAKE.**—If the executor and all the persons interested erroneously believe that a tract of land is chargeable with the payment of a debt, which he, therefore, pays, equity will compel the legatees to refund. *Id.*
4. **LEGATEES** should not be required to pay any part of the debts until the executor has accounted for the personal estate. *Id.*
5. **LEGACY PAID BY MISTAKE.**—One who, under the mistaken belief that he was entitled to a tract of land, pays a legacy charged upon it, may recover the sum paid from the true owner. *Id.*

LIBEL.

1. **WHERE PUBLISHED.**—If the libel be, at the request of the defendant, inserted in a newspaper published in an adjoining state, which usually circulates, and which, in fact, was circulated in this state, he is guilty of a publication in this state. *Commonwealth v. Blanding*, 214.
2. **MALICIOUS INTENT** is to be inferred as a conclusion of law from the publication of a libel, where there is no evidence to show the truth of the alleged libel, or its publication from some warrantable purpose. *Id.*
3. **A LIBEL, THOUGH TRUE**, is a public offense, hence the truth of the libel can not ordinarily be shown in defense. *Id.*
4. **THE LIBERTY OF THE PRESS** guaranteed by the constitution, does not secure to libelers immunity from civil or criminal prosecution. *Id.*
5. **PROCEEDINGS IN LEGISLATIVE ASSEMBLIES**, or in courts of justice, whether written or printed, are privileged, and can not be made the basis for actions of libel or slander; but the rule is otherwise if this privilege is abused for malicious purposes. *Id.*
6. **THE TRUTH OF AN ALLEGED LIBEL** may be given in evidence as a defense, when it appears that the matter complained of was communicated from a sincere and honest purpose, free from malice, to some person who had a right to act upon it, and whose duty and interest are concerned in it. A promiscuous promulgation of the same facts, would of itself be the strongest evidence of malice. Whether any particular case is a proper one in which to receive proof of the truth of the libel, is for the court to determine, and if the court receive the proof, the jury must decide whether the publication was made with good motives, and for justifiable purposes. *Id.*
7. **THE PUBLICATION OF JUDICIAL PROCEEDINGS**, if accompanied by comments and insinuations of a defamatory character, make the publisher guilty of libel. *Id.*
8. **ON AN INDICTMENT FOR PUBLISHING** in a newspaper a libel charging an inn-keeper with misconduct, for which he is liable to punishment, the truth of the libel is not admissible in evidence. *Id.*
9. **A FALSE COMPLAINT** made with express malice, or without probable cause, to a body having power to redress the wrong complained of, may be the subject of an action of libel. *Bodwell v. Osgood*, 228.
10. **THE QUESTION OF MALICE**, in publishing a libel, is to be decided by the jury. The deliberate publication of a calumny, knowing it to be false, or without having reason to believe it true, is conclusive evidence of malice. *Id.*

11. MALICE, EVIDENCE OF.—Taking depositions with the view to prove the truth of a libel, and then abandoning this defense at the trial, may properly be referred to the jury on the question of malice, but not on that of damages. *Id.*

See NEW TRIALS, 3.

LICENSE.

See WATER-COURSES, 4.

LIENS.

1. A VENDOR HAS A LIEN on the premises sold for the purchase-money, and his lien is not affected by making a conveyance and taking a note or bond, with personal security for the balance due. *Tiernan v. Beam*, 557.
 2. EXISTENCE OF VENDOR'S LIEN IS PRESUMED until the contrary appears. *Id.*
 3. VENDOR'S LIEN is not discharged by the death of the vendor, and the consequent transfer of the debt to his heir or devisee. *Id.*
- See ALIMONY, 2; EXECUTIONS, 23; SHIPPING, 6; VENDOR AND VENDEE, 2.

MAINTENANCE.

See CHAMPRETY, MAINTENANCE, AND BARRATRY.

MALICE.

See LIBEL.

MARRIAGE.

See DIVORCE, INFANCY, 1.

MARSHALING ASSETS.

See ESTATES OF DECEASED PERSONS, 4.

MAY.

See WORDS.

MISTAKE.

See EQUITY, 1, 6, 7; LEGACIES, 5; NEW TRIALS, 5.

MORTGAGES.

BALANCE DUE AFTER FORECLOSURE OF A MORTGAGE in equity may be recovered at law by a suit on the bond. *Globe Ins. Co. v. Lansing*, 474.

See EVIDENCE, 2.

NECESSARIES.

See INFANCY, 3.

NEGLIGENCE.

1. COUNTERFEIT MONEY.—One who receives a counterfeit note from an innocent person and keeps it six months after knowing its true character, without giving any notice thereof, is guilty of gross negligence and must sustain the loss. *Raymond v. Baar*, 603.

2. **NEGLIGENCE CONTRIBUTIVE**—Although the defendant does not exercise ordinary care, no recovery can be had against him if the injury complained of would not have been sustained but for want of care on the part of plaintiff. *Washburn v. Tracy*, 661.
2. **PERSON ON HORSEBACK** should yield the road to one who is traveling in a vehicle. *Id.*

See *AUDITA QUERELA*, 4.

NEGOTIABLE INSTRUMENTS.

1. **LOST NOTE**.—An action on a lost note may be maintained without tendering the defendant any indemnity, if it appears that the note in the hands of any indorsee would be subject to all equities existing in favor of the maker. *Brent v. Ervin*, 157.
2. **INDORSER, PROMISE AFTER PROTEST**.—A promise by an indorser after protest, to pay the note, is a waiver of notice of protest, and is *prima facie* evidence that due notice was given. *Debuys v. Mollere*, 159.
3. **DEMAND, AT A PARTICULAR PLACE**.—If a note be made payable at a particular place, a demand at that place must be made to authorize a recovery against either maker or indorser. *Mellon v. Croghan*, 163.
4. **LOST NEGOTIABLE NOTE**.—No action at law can be maintained by the transferee on a lost negotiable note payable to bearer. The remedy is in equity. But if the note is not negotiable, or if negotiable, has never been negotiated, the payee can recover at law. *Rowley v. Ball*, 266.
5. **A NEGOTIABLE NOTE SHOWN TO HAVE BEEN DESTROYED** will sustain an action at law. *Id.*
6. **DEMAND ON DRAWER OF A NOTE** must usually be made to charge the indorser. This rule is subject to numerous qualifications and exceptions, where no such demand can be made without unreasonable labor and inconvenience, as where the drawer has removed into a distant country, or can not be found. *Galpin v. Hard*, 640.
7. **THE REMOVAL OF THE MAKER OF A NOTE** from the place where he resided, or was in the note represented to reside, imposes upon the holder the duty of using every reasonable endeavor to find the maker, and demand payment of him, in order to charge the indorser. *Id.*
8. **NOTE PAYABLE TO BEARER** must be presented, and demand for payment made, in the same manner as if payable to order. *Id.*
9. **NOTE DATED AT A PARTICULAR PLACE** is not payable there only; if the maker be not found there, he must be sought elsewhere, and demand made of him if found. *Id.*

See *BANKS*, 3; *PROTEST*.

NEW TRIALS.

1. **IMPROPRIETIES OF JURORS**, in conversing with other persons while deliberating on their verdict, will not justify a court of equity in granting a new trial at law. *Yancey v. Downer*, 35.
2. **NEW TRIAL** will not be granted for error in instructions, nor on the ground of surprise, unless the evidence is before the appellate court to enable it to determine whether any error has been committed. *Blue v. Kibby*, 95.
3. **NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES**, awarded by a jury to plaintiff for a libel, will not be granted, unless a strong case is made out. *Bodwell v. Osgood*, 229.

4. **NEW TRIAL TOTIES QUOTIES** will be granted if the verdict is contrary to law, or when there is no evidence to support it. *Turnbull v. Rivers*, 622.
5. **NEW TRIAL** will not be granted on account of an error or mistake in the instructions to the jury, which could not have altered the verdict. *Ross v. Bank of Burlington*, 604.
6. **NEW TRIAL ON GROUND OF SURPRISE** will not be granted, unless it appears that the moving party was injured by the surprise, and that if a new hearing be granted, he can make out a good cause of action or defense. *Blake v. Howe*, 681.

See JURY.

NOTICE.

1. **AN UNRECORDED DEED**, as between the parties, passes the estate immediately on its delivery; and upon being recorded, relates back to the time of its delivery, to all intents and purposes, unless the grantor has, in the meantime, made a conveyance to a subsequent *bona fide* purchaser, or the property has been attached or otherwise incumbered. *McMechan v. Griffing*, 198.
2. **NOTICE OF AN UNRECORDED DEED** binds a purchaser to the same extent as a registry thereof, for the taking of a legal estate after notice of a prior right makes a *mala fide* purchaser. *Id.*
3. **NOTICE** may be either express or implied. *Id.*
4. **EXPRESS NOTICE** must be shown by clear and unequivocal proof. *Id.*
5. **IMPLIED NOTICE** of an unrecorded deed arises when an entry is made under the deed, and is succeeded by visible improvement of the land, and taking the profits thereof. *Id.*
6. **POSSESSION UNDER AN UNRECORDED DEED**, if open and notorious, is generally sufficient to raise a presumption of notice; but the change of possession must be visible. If one who is the owner and in possession of a part of a lot of land, purchase the residue (there being no partition fence), and do nothing after the purchase but repair the fence around the lot, depasture cattle in it, sell some trees and remove an old hovel, these facts are insufficient to charge a subsequent purchaser with notice. *Id.*

See VENDOR AND VENDEE, 3.

NUISANCES.

INJUNCTION TO PREVENT A NUISANCE from being created or erected will be issued. *Bell v. Blount*, 526.

OFFICE AND OFFICERS.

LIABILITY OF JUSTICE OF THE PEACE.—A justice who acts without jurisdiction is liable as a trespasser. The rule is otherwise if he errs in the exercise of established jurisdiction. *Adkins v. Brewer*, 264.

See BONDS, 2, 3; CONSTITUTIONAL LAW, 2, 4, 6, 7.

PARTIES.

See GUARDIAN AND WARD, 1, 3; PLEADING AND PRACTICE, 2, 8, 9, 10; SLANDER, 3.

PARENT AND CHILD.

WAIVER OF RIGHT TO EARNINGS OF A MINOR.—If a minor son makes a contract for his services on his own account, with the knowledge and without the objection of his father, there is an implied assent that the minor shall have his earnings. *Whiting v. Earle*, 207.

PARTITION.

1. **PARTITION** of land, valuable chiefly as an ore-bed, refused because the court could not ascertain the value of the different parts, and because the parties could obtain a less hazardous and more adequate remedy in chancery. *Conant v. Smith*, 669.
2. A **SAW-MILL, MILL-YARD, and mill-pond** are not partible, and, therefore, are not proper subjects for partition. *Brown v. Turner*, 696.
3. **PARTITION IN EQUITY** is a matter of right and not of discretion, in all cases where the complainant is entitled to partition at law, and can show a clear legal title. *Wiseley v. Findlay*, 711.

See **BOUNDARIES**, 7, 8.

PARTNERSHIP.

PARTNERSHIP UNKNOWN.—If goods be sold to, and charged against one of the members of a partnership, the existence of the partnership not being disclosed, the firm is liable to the vendor, if the goods were furnished to it and its benefit, and this although there be an agreement in writing with the vendor, signed by the individual partner only. *Reynolds v. Cleveland*, 369.

See **ASSUMPSIT**.

PEDIGREE.

See **EVIDENCE**, 23, 24.

PLEADING AND PRACTICE.

1. **RIGHT RESERVED TO GIVE SPECIAL MATTER** in evidence can not embrace matters which could not be pleaded in bar. *Scott v. Coleman*, 71.
2. **NON-JOINDER OF CO-TENANT.**—If an action be brought by one co-tenant against a stranger, the non-joinder of the others must be taken advantage of by a plea in abatement unless it appears on the face of the complaint; in which case it may be taken advantage of by demurrer or in arrest of judgment. *Bell v. Layman*, 83.
3. **EXCEPTIONS** must be taken at the trial, but they may be written out and sealed afterwards; and, though the bill of exceptions is enrolled and filed after the trial, it will be presumed that the exception was taken at the proper time. *Hughes v. Robertson*, 104.
4. **REFUSAL OF A CONTINUANCE IS NOT REVIEWABLE** in this court under our statute. *Smalley v. Anderson*, 121.
5. **MATTERS OF DEFENSE**, arising after issue joined, must be pleaded *purs darrein continuance*; but a deed which, by relation, takes effect prior to issue joined, need not be so pleaded. *Jackson v. Ramsay*, 242.
6. **WRIT OF ERROR** is a writ of right, and need not be allowed by a judge; filing it with the clerk and entering its receipt is a sufficient allowance. *Van Antwerp v. Newman*, 340.

7. **DEFENDANT'S EVIDENCE** may entitle plaintiff to judgment when his own does not. *Jackson v. Town*, 405.
8. **JOINDER OF CAUSES AND PARTIES**.—A bill filed against several persons, concerning distinct things or acts, is demurrable. Unconnected parties may unite in a suit, if there is one connected interest among them all, centering in the point in issue in the case. *Fellows v. Fellows*, 412.
9. **JOINDER OF DEFENDANTS IN BILL TO VACATE FRAUDULENT TRANSFERS**. If property be fraudulently conveyed and parceled out by its owner to several persons, they may be joined in one bill to vacate the transfers. *Id.*
10. **A BILL AGAINST SEVERAL PERSONS** must relate to matters of the same nature, and having a connection with one another; and all of the defendants must be more or less concerned, though their rights in respect to the general subject of the cause may be distinct. *Id.*
11. **REFUSAL TO CHARGE THE JURY** on a point material to the cause, and upon which evidence has been received, is error. *Washburn v. Tracey*, 661.
12. **LAW OF THE CASE**.—The court having decided that a complaint was good on special demurrer, will not hold it to be bad, on motion for arrest of judgment, based on the same grounds. *Ross v. Bank of Burlington*, 664.
13. **ORDER OF PROOF**.—The party on whom rests the burden of proving any fact, must first proceed with evidence for that purpose, and, if no testimony is given tending to disprove the fact thus sought to be established, no further testimony will be received upon that point. *Pingry v. Washburn*, 676.
14. **A BILL IS MULTIFARIOUS** and demurrable which unites separate, distinct and unconnected claims against several defendants. *Stuart's Heirs v. Coalter*, 731.
15. **WHERE A GENERAL DEMURRER TO A BILL** would hold, the court will not grant relief, even though the defendant answer. *Id.*

See ATTACHMENT, 3; GUARDIAN AND WARD, 1, 3.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PROCESS.

CONSTRUCTIVE SERVICE OF PROCESS and proceedings *in rem*, are authorized by the laws of most of the states, and judgments founded on such service or proceedings, are valid. *Scott v. Coleman*, 71.

PROTEST.

1. **A PROTEST** is essential to a recovery on a foreign bill of exchange. *Read v. Bank of Kentucky*, 86.
2. **A PROTEST MAY BE MADE** by a private person in the presence of two witnesses if no notary can be obtained, and it is no objection to the protest that the person making it is a stockholder in the bank holding the bill. *Id.*

3. THE WITNESSES TO THE PROTEST need not subscribe their names. If the protest is drawn up a few hours after the demand, the necessity of noting the bill at the moment is superseded. *Id.*
4. COSTS OF PROTEST cannot be charged where the protest is made by a private individual. *Id.*

REAL ESTATE.

1. REJECTION OF "ABOUT" IN CALLS OF ENTRY.—Where an entry calls for land on a certain creek, "about seven miles" from its mouth, the word "about" must be rejected, and the distance taken in a straight line from the mouth, if the stream is of sufficient length. *Sanders v. Morrison*, 140.
2. MEANDERS, WHEN FOLLOWED.—In such a case, if the stream is a large river, or is not of sufficient length, the meanders may be followed in measuring the distance. *Id.*
3. POSSESSION IS PRIMA FACIE evidence of legal title. *Jackson v. Town*, 405.
4. DESCRIPTION.—"Seventy acres of land being and lying in south-west corner of the south-west quarter of section fourteen," is sufficient as a description. The lands will be located in a square. *Walsh v. Ringer*, 555.

See CORPORATIONS, 3.

RECORDING.

See NOTICE, 1, 2, 5, 6.

RELATION.

See EXECUTIONS, 18.

RELEASES.

1. A RELEASE OF ONE OF SEVERAL JOINT TRESPASSERS, releases all, though the party giving the release stipulated that it should not discharge the others. *Ellis v. Bitzer*, 534.
2. THE ACCEPTANCE OF THE NOTE of one of several co-trespassers in satisfaction of the wrong done by him, releases the others, although the note remains unpaid, and is brought into court to be canceled. *Id.*

REMAINDERS AND REVERSIONS.

1. COMPUTING VALUE OF.—The value of a remainder is ascertained by making a probable estimate of the life of the holder, health and age considered, and then raising an annuity equal to the interest of the value of the estate, and calculating its present worth at a fixed ratio, supposing it to continue during the probable length of life, and deducting that present worth from the value of the estate, and the residuum is the worth of the remainder. *McCampbell v. McCampbell*, 48.
2. REVERSIONERS AND REMAINDER-MEN are not, during the existence of the particular estate, affected by the statute of limitations, because they have no right of entry. *Jackson v. Johnson*, 433.

RES ADJUDICATA.

See JUDGMENTS.

RESCISSION OF CONTRACT.

See EQUITY, 3, 4, 5, 6, 7.

RENT.

1. COMPUTATION OF RENT against a *bona fide* occupant, should begin from the filing of the bill, but, against a *mala fide* possessor, from his entry, if within the period prescribed in the statute of limitations for actions for *mesne profits*. *Pugh v. Bell*, 143.
2. RENT IS CHARGEABLE only on the premises as they were when received by the occupant or his grantor, exclusive of improvements made by them. *Id.*

See LANDLORD AND TENANT, 6, 11, 12, 13.

SALES.

VENDOR IS LIABLE FOR SELLING A BLIND HORSE at a sound price, without declaring his blindness, if it was such as not to be discovered at first view. *Hughes v. Robertson*, 104.

See FRAUDULENT CONVEYANCES.

SEALS.

See CORPORATIONS, 5.

SET-OFF.

SET-OFF MUST BE AN EXISTING DEBT in favor of defendant when the action was commenced. It is not sufficient that it was contracted for before, but not transferred to defendant till after suit brought. So, a person is not entitled to a set-off against a bankrupt, unless it existed when the bankruptcy happens; nor against an administrator, unless entitled to the set-off against the decedent. *Shepherd v. Turner*, 631.

SHERIFFS.

1. AN EX-SHERIFF MAY, after going out of office, whether by resignation or by the expiration of his term, sell property levied upon by him while in office. *Lofland v. Ewing*, 41.
2. THE DEPUTY OF A SHERIFF who levied upon property while in office, may, with or without a *venditioni exponas*, sell the property after the sheriff has gone out of office. *Id.*
3. THE DIVISION OF A COUNTY, after a levy upon lands, does not deprive the officer making the levy of authority to proceed with the sale. *Id.*
4. SHERIFF'S RETURN IS CONCLUSIVE in an action between the parties to the suit in which it was made. *Diller v. Roberts*, 578.
5. SHERIFF NOT LIABLE FOR INTEREST when money is tied up in his hands by a rule of court, although the purchasers may be responsible to him for interest during the same period. *Stewart v. Stocker*, 589.

See BONDS, 2, 3; EXECUTIONS.

SHIPPING.

1. FREIGHT, REFUNDING OF.—If freight be paid in advance it must be refunded, if, without fault of the shipper, the goods are never carried to their point of destination. *Griggs v. Austin*, 175.

2. AN AGREEMENT TO WAIVE the right to reclaim money paid in advance for freight, is not to be inferred from a clause in the bill of lading, stating that the goods are to be delivered safely, "the dangers of the sea excepted." *Id.*
3. FREIGHT IS THE COMPENSATION for the carriage of goods. *Id.*
4. FREIGHT ON MERCHANDISE LOST by shipwreck or stranding, or by pirates or enemies, can not be collected, and, if wholly or partly paid in advance, must be refunded. *Id.*
5. AN ADVANCE OF FREIGHT means the same thing as a payment of freight beforehand, and neither implies a stipulation that the amount paid or advanced shall not be returned if the goods are not carried. *Id.*
6. LIEN FOR EXPENSES.—No lien upon a ship is created by the sale of part of its cargo, at a port of necessity, to pay for repairs. *Depau v. Ocean Ins. Co.*, 431.
7. THE CONSIGNOR IS LIABLE FOR FREIGHT.—The carrier is not bound to the consignee nor to the consignor's factor. *Hayward v. Middleton*, 615.

SLANDER.

1. WORDS IMPUTING ADULTERY to a married woman are actionable by statute, but not at common law. *Smalley v. Anderson*, 121.
2. PLEA TO THE WHOLE ACTION must answer all the declaration. *Id.*
3. IN AN ACTION FOR SLANDER OF A WIFE, the husband and wife must join, and the declaration properly concludes to the damage of the plaintiffs. *Id.*
4. WORDS ARE NOT ACTIONABLE PER SE unless they impute a crime liable to punishment. *Brite v. Gill*, 122.
5. THE WORD "THIEF" is not actionable unless intended to impute a felony; hence, if it be accompanied by other words showing that it was spoken with reference to a mere breach of trust, an action will not lie. *Id.*
6. THE RELATION IN WHICH WORDS WERE USED, which are charged as slanderous, may be shown under the general issue, or by a special plea in bar, to prove that they were not intended to impute a crime; and, if specially pleaded, it is the province of the court to decide whether the words are slanderous or not. *Id.*

SOVEREIGNTY.

1. THE PEOPLE, OR THE SOVEREIGN, are not bound by general words in a statute, restrictive of prerogative right, title or interest, unless expressly named. *People v. Herkimer*, 379.
2. ACTS OF LIMITATION AND BANKRUPTCY do not bind the king nor the people. *Id.*
3. THE PEOPLE have succeeded to all the rights of the king, the former sovereign. *Id.*
4. THE SOVEREIGN POWER is not estopped by the grants. *Taylor v. Shafford*, 512.

SPECIFIC PERFORMANCE.

1. CONTRACT TO CONVEY.—One who has contracted to convey lands will not be compelled to convey a part to the grantee of his obligee, but such grantee is entitled to a decree compelling a conveyance of the whole to his grantor, as provided in the original contract. *Hancock v. Hancock*, 92.

2. **SURVEY, WHEN ORDERED.**—If it appear that complainant is entitled to a conveyance of land, but its quantity and location are uncertain, a survey should be ordered. *Id.*
3. **SPECIFIC PERFORMANCE OF A CONTRACT** is not decreed as a matter of course, but only in the exercise of a sound legal discretion. The complainant must present a contract which is fair, just and reasonable, entered into upon an adequate consideration, and free from fraud, misrepresentation or surprise, and not hard, unequal or unconscionable. *Seymour v. Delancy*, 270.
4. **DISCRETION WHICH THE CHANCELLOR POSSESSES** in suits for specific performance of contracts is not arbitrary or capricious; it must be regulated on grounds which will make it judicial. *Id.*
5. **INADEQUACY OF PRICE** alone is not a sufficient ground to vacate a contract, but the enforcement of a contract may be refused where the consideration is so inadequate as to make the contract hard, unfair and unreasonable. (*Per SAVAGE, C. J.*) *Id.*
6. **TITLE OF VENDOR.**—It is ordinarily sufficient that the vendor, seeking specific performance, is able to make title at the entry of the decree, though before then his title was imperfect. *Id.*
7. **THE HABITUAL INTEMPERANCE** of one of the contracting parties may be a ground for denying a decree for specific performance, where it is sufficient to cast a suspicion on the fairness of the transaction. *Id.*
8. **INADEQUACY OF PRICE** without fraud or other ingredient, is not sufficient to stay the power of chancery to enforce a contract for the sale of land, unless the inadequacy is so gross as to be evidence of fraud. *Id.*
9. **THAT THE VENDOR'S REMEDY** at law is gone, by reason of there being a mortgage on the estate, so that he could not convey a good title at the day named in the contract, is no ground for refusing specific performance in equity. *Id.*
10. **IN AN ENTIRE CONTRACT** for the sale of five tracts of land, and a separate bond given for the conveyance of two, the purchaser can not have specific performance without performing, on his part, the entire contract. *Tiernan v. Beam*, 557.
11. **WANT OF POWER TO CONVEY** can not be supplied in chancery. Hence, if executors convey without power, their conveyance can not be aided in equity. *Id.*

STATUTES.

1. **REPEAL, BY ENACTING A CODE.**—Re-enacting into a code the general provisions of prior laws does not repeal the exceptions to which these general provisions were subject. *Miller v. Mercier*, 156.
2. **A STATUTE AUTHORIZING THE BUILDING OF A DAM** protects the person so authorized from indictment for a nuisance, without limiting their liability for damages resulting from the flowing the lands of others. *Crittenden v. Wilson*, 462.
3. **CUMULATIVE REMEDIES.**—If a statute provide a remedy for a matter before actionable at common law, the common law remedy is not thereby divested. *Id.*
4. **STATUTE GIVING A NEW REMEDY** does not alter the nature of the wrong complained of; if a tort before such statute was enacted, it remains a tort afterwards. *Wilson v. Myers*, 510.

5. **STATUTORY CONSTRUCTION.**—The preamble to an act may be used to explain equivocal expressions, but never to control the obvious meaning of the statute, nor to supply matter not embraced in its spirit. *Bynum v. Clark*, 633.
6. **IMPAIRING CORPORATE RIGHTS.**—The legislature can pass no act impairing the rights or privileges of a corporation opposed to the original grant, without its consent. *Pingry v. Washburn*, 676.
7. **POWER TO CONDEMN LAND FOR A TAIL-RACE** is not given by statute in Virginia. *Coalter v. Hunter*, 726.
8. **ORDER ESTABLISHING A MILL**, under the statute, must be certain. *Id.*
See EVIDENCE, 14.

STATUTE OF FRAUDS.

1. **A CONTRACT WHICH COMES WITHIN THE STATUTE OF FRAUDS** is not entirely void. It is valid for all purposes, except sustaining an action at law for its breach, or a suit in equity for its performance. *McCampbell v. McCampbell*, 48.
2. **AUCTION SALES** are within the statute of frauds. *Meadows v. Meadows*, 645.
3. **AN AUCTIONEER IS THE AGENT** of both parties, and may make the memorandum required by the statute of frauds. *Id.*
4. **AN AUCTIONEER'S CLERK** is not authorized to make the memorandum to take the case out of the statute of frauds. *Id.*
5. **MEMORANDUM OF SALE** to take the case out of the statute of frauds must show distinctly the article sold, the price thereof, and the name of the purchaser. "The tract of land to Wm. Meadows, jun., at five dollars and forty-eight cents," is an insufficient memorandum. *Id.*
See GUARANTY, 1.

STATUTE OF LIMITATIONS.

1. **ENTRY TO STOP.**—If a tract of land lies partly in two counties, and is held adversely to the owner, his entry on the part in one county does not stop the running of the statute as to the part in the other county. *Hord v. Walker*, 39.
2. **LIMITATIONS IN EQUITY.**—Statutes of limitations do not, in terms, apply to equity suits, but stale demands are not favored by courts of chancery, and such courts adopt, with respect to equitable rights, the limitations prescribed by statute in analogous cases at law. *Pugh v. Bell*, 142.
3. **SUITS RESPECTING LAND ARE LIMITED** usually by the shortest period allowed for actions to recover realty, and, in general, equitable rights must be asserted within twenty years. *Id.*
4. **TIME DOES NOT BEGIN TO RUN AGAINST** heirs continuing in possession with the widow, under a bond for title, under which the father held, for the purpose of barring a suit against a purchaser, with notice, until the latter's conveyance is executed. *Id.*
5. **OPEN RUNNING ACCOUNT—LIMITATIONS.**—When an account between merchants, or between banker and depositor has been balanced, and the balance carried forward, it is no longer an open running account. The parties cannot go behind the settlement without leave obtained in chancery, and the statute of limitations runs against the balance from the settlement of the account. *Union Bank v. Knapp*, 181.

6. **JOINT DEBT.**—An acknowledgment by one of several joint debtors will, as against all, take the debt out of the statute of limitations. *White v. Hale*, 209.
7. **CUMULATIVE DISABILITIES** are not allowed by the statute of limitations; but a party is entitled to all the disabilities existing when his cause of action accrues, and the statute does not commence to run against him until all have terminated. *Jackson v. Johnson*, 433.
8. **A PERSON UNDER DISABILITY** has ten years after the removal thereof in which to sue, although the twenty years in which other persons could sue have elapsed; if the disability be removed within the twenty years, then he must sue within ten years after such removal, provided that, in no case, can he be deprived of the full twenty years after the cause of action first accrued. *Id.*
9. **LIMITATION.**—A right of entry in favor of a person must exist before the statute of limitations can run against him. *Id.*
10. **ACKNOWLEDGMENT.**—When the note was presented to defendant he said: "That note has not been paid, and I will not pay it unless compelled by law, as it is out of date, and I received no consideration for it;" and this was held to be a sufficient acknowledgment to take the case out of the statute of limitations. *Lee v. Perry*, 650.
11. **RETURNING TO THE STATE** publicly by a debtor, with the intent to permanently reside therein, although in a part distant from his former residence, is a returning or coming within the state within the meaning of the statute of limitations, though unknown to the creditor. So, if the return, though temporary and without intent to remain, is known to the creditor, and is such as to give opportunity for the arrest of the debtor. *Mazonon v. Foot*, 679.

See ADVERSE POSSESSION, 1, 6; SOVEREIGNTY, 2.

SURETYSHIP.

1. **SURETY RELEASING PRINCIPAL TO TESTIFY.**—Though a release operates only on present rights, yet where a surety, being sued alone, releases his principal from liability over, for the purpose of making him a witness, it is possible that the release may operate, because as the surety's right to indemnity arises when the contract is made, it may be regarded as a present right to take effect in future. *Bank of Limestone v. Penick*, 136.
2. **SURETY ESTOPPED BY RELEASE.**—Whether such release be an absolute discharge or not, if it be accompanied by a covenant not to resort to the principal, the surety will be estopped from demanding remuneration from the principal in case the action goes against him, and the principal is, therefore, a competent witness. *Id.*
3. **BLANK FILLED UP WITHOUT AUTHORITY.**—Where a blank note is filled up by the payee in a manner not contemplated or authorized by the maker, it is not binding upon him unless he ratifies it. *Id.*
4. **A SURETY SIGNING** a note thus filled up in a manner not authorized by the principal, and without being apprised of such alteration, is not bound, and in order to charge him the payee must show that he knew the fact. *Id.*
5. **AN UNAUTHORIZED ALTERATION** of an instrument by the obligee, though beneficial to the obligor, avoids it; as where a new surety is added. *Id.*

6. A SURETY NEED NOT SIGN AT THE SAME TIME as the principal. *Id.*
7. WHERE A SURETY SIGNS AFTER THE DISCOUNTING of a note, no new discount is necessary to bind him. *Id.*
8. CONTRIBUTION AMONG CO-SURETIES does not arise from any contract between them, but from the principle that equality is equity. *Moore v. Moore*, 523.
9. IF INDEMNITY BE TAKEN BY A SURETY to secure him from loss, and as a condition precedent to his becoming a surety, his co-sureties are not entitled to the benefit of the indemnity until after he, for whose benefit it was given, is fully repaid. *Id.*
10. SURETY IS DISCHARGED if the creditor, having the means of satisfaction actually or potentially in his hands, refuses to retain it. The same rule applies when the surety apprises the creditor of the means of recovering the debt, and the latter declines to pursue it. *Lichtenthaler v. Thompson*, 581.

SURPRISE.

See NEW TRIALS, 2, 6.

TAX TITLES.

1. THE ASSESSMENT OF "PART OF A LOT," or of "one acre of a lot," without any location, is too vague to authorize or support a sale. *Massie's Heirs v. Long*, 507.
2. PARTNERSHIP TO PURCHASE AT TAX SALES is against the policy of the law, is a fraud on the owner, and the purchaser can not obtain an available title. *Dudley v. Little*, 575.
3. TAX SALE, WHO MAY ACQUIRE TITLE BY.—A tenant in possession, who is under obligation to pay the taxes, can not acquire title to the premises by a purchase at a tax sale made in his own name, or in the name of another person for his benefit; and it seems that a title so acquired would remain void in the hands of a *bona fide* purchaser without notice. *Blake v. Howe*, 681.

TENDER.

TENDER OF PONDEROUS ARTICLES, where the contract designates no place, should be made by seeking the obligee before the day appointed, inquiring where he will have them delivered, and then delivering them at the place by him designated, if he appoint a reasonable place and one within the probable contemplation of the parties. The articles tendered must be separated from other articles, so that the promisee can know which to take. *Barns v. Graham*, 394.

TENANTS IN COMMON.

1. CO-HEIRS are tenants in common; and, in bringing real actions, may, by statute, either join or may sue separately. They can not be compelled to unite on one action. *Malcolm v. Rogers*, 464.
2. JOINDER OF CO-TENANTS.—The general rule is that tenants in common can not join nor be joined in real or mixed actions, unless some entire or indivisible thing is to be recovered. *Id.*

See ADVERSE POSSESSION, 5; ASSUMPSIT; CONVERSION, 2, 3; EJECTMENT, 2; PLEADING AND PRACTICE, 2.

TENANTS BY CURTESY.

See CURTESY.

TRESPASS.

1. AN ABUSE OF LEGAL AUTHORITY makes the guilty person liable as a trespasser *ab initio*. *Barrett v. Lightfoot*, 110.
2. ESTRAYS.—The using of an estray by the taker up, except in a matter of necessity and for the benefit of the owner, is wrongful, and renders him liable in trespass. *Id*.

USAGES.

A USAGE, to be binding, must be of long standing, uniform in operation, just and reasonable, and known to and acquiesced in by all those whose rights are affected by it. *Hayward v. Middleton*, 615.

VENDOR AND VENDEE.

1. IMPROVEMENTS, COMPENSATION FOR.—If land be sold by a verbal sale, and possession given to the purchaser, he will be allowed in equity for improvements made by him, if the vendor refuses to convey the property. *McC Campbell v. McC Campbell*, 48.
2. PURCHASER'S LIEN.—If a purchaser pay a portion of the purchase-price of lands, and the contract of sale be not enforceable because within the statute of frauds, he has a lien on the property to secure the repayment of the amount paid. He has not the right to retain the possession until paid out of the rents, but is entitled to a decree for the sale of a quantity sufficient to cover his lien. *Id*.
3. PURCHASER WITH NOTICE OF EQUITY.—When a defendant purchases land with notice of the plaintiff's equitable title, and that his vendor's only interest arises from his having paid part of the consideration of the contract, through which the plaintiff derives title, he will be compelled to convey to the plaintiff on repayment of that sum. *Pugh v. Bell*, 142.
4. A PURCHASE FROM INFANT PLAINTIFFS avails nothing. *Id*.
5. INCUMBRANCES KNOWN to vendor and vendee at the time of the sale, and provided against by a covenant of warranty in the deed, constitute no ground of defense to an action for the purchase-price. *Fuhrman v. London*, 608.
6. A CONVEYANCE in which the grantors recite that the property is subject to a life-estate, when in fact it is subject to an estate for years only, is good as a transfer of the entire estates of the grantors in the property. *Wiseley v. Findlay*, 711.

See LIENS.

VENUE.

ACTIONS.—Land lying out of the county cannot be recovered in an action in the circuit court. *Hord v. Walker*, 39.

VOLUNTARY CONVEYANCES.

See FRAUDULENT CONVEYANCES.

WATER-COURSES.

1. **WATER, RIGHT TO DIVERT.**—If water has been used for more than forty years for the purpose of driving a mill, the owner of land bordering on the stream has no right to divert the water so as to impede the operation of the mill. *Cook v. Hull*, 208.
2. **RIGHT IN WATER-COURSE.**—A land owner has a right to the uninterrupted flow of the water in streams on his land unless some adjacent proprietor has acquired an adverse right to divert the same. *Coalter v. Hunter*, 728.
3. **A RIGHT TO DIVERT A STREAM**, running through another's land, may be acquired by adverse enjoyment for twenty years. *Id.*
4. **MERE LICENSE TO DIVERT A STREAM**, or a loan of the use of it, cannot be ripened into a right by lapse of time. *Id.*

WAYS.

See EASEMENTS.

WILLS.

1. **INTENTION OF TESTATOR** cannot be shown otherwise than by his will; proofs cannot be received to alter the effect of the will. *McC Campbell v. McC Campbell*, 48.
2. **LUCID INTERVALS.**—If the testator was, from some time prior to executing his will until his death, deranged by habitual intemperance, but having some lucid intervals, it must be shown to establish the will, that it was made in one of those intervals. *Case of Cochran's will*, 116.
3. **PROOF OF WILL.**—Where one witness to a will devising land, testified that by direction of the testator, and in her presence, and that of another witness, he signed the testator's name, and subscribed his own as a witness; and the other witness testified that he heard the testator acknowledge the will, and that he subscribed it as a witness, at her request, and in her presence, the proof was held sufficient. *Welch v. Welch*, 126.
4. **THE PROOF OF THE EXECUTION** of a will may be made by one of the subscribing witnesses only, although the will be lost, and the witness has forgotten the name of one of the other subscribing witnesses. *Dan v. Brown*, 395.
5. **DECLARATIONS OF A TESTATOR**, regarding the cancellation of a will, are inadmissible if not connected with any act done or attempted by him, to effect a revocation. *Id.*
6. **WILL OF PERSONALTY** must be executed and attested as required by the law in force at the death of the testator. *Houston v. Houston*, 647.
7. **REVOCATION OF DEVISES** are, at common law, express or implied. The latter are termed revocations in law. *Graves v. Sheldon*, 653.
8. **REVOCATIONS IN LAW** resulted, at common law: 1. From a total alteration in the circumstances of the devisor; 2. From an actual or intended alteration in his estate; but in this state a revocation does not result from an alteration in the circumstances of the testator, nor from an intended alteration in his estate. *Id.*
9. **IMPLIED REVOCATIONS** are, in this state, those only which result *ex necessitate rei*. *Id.*

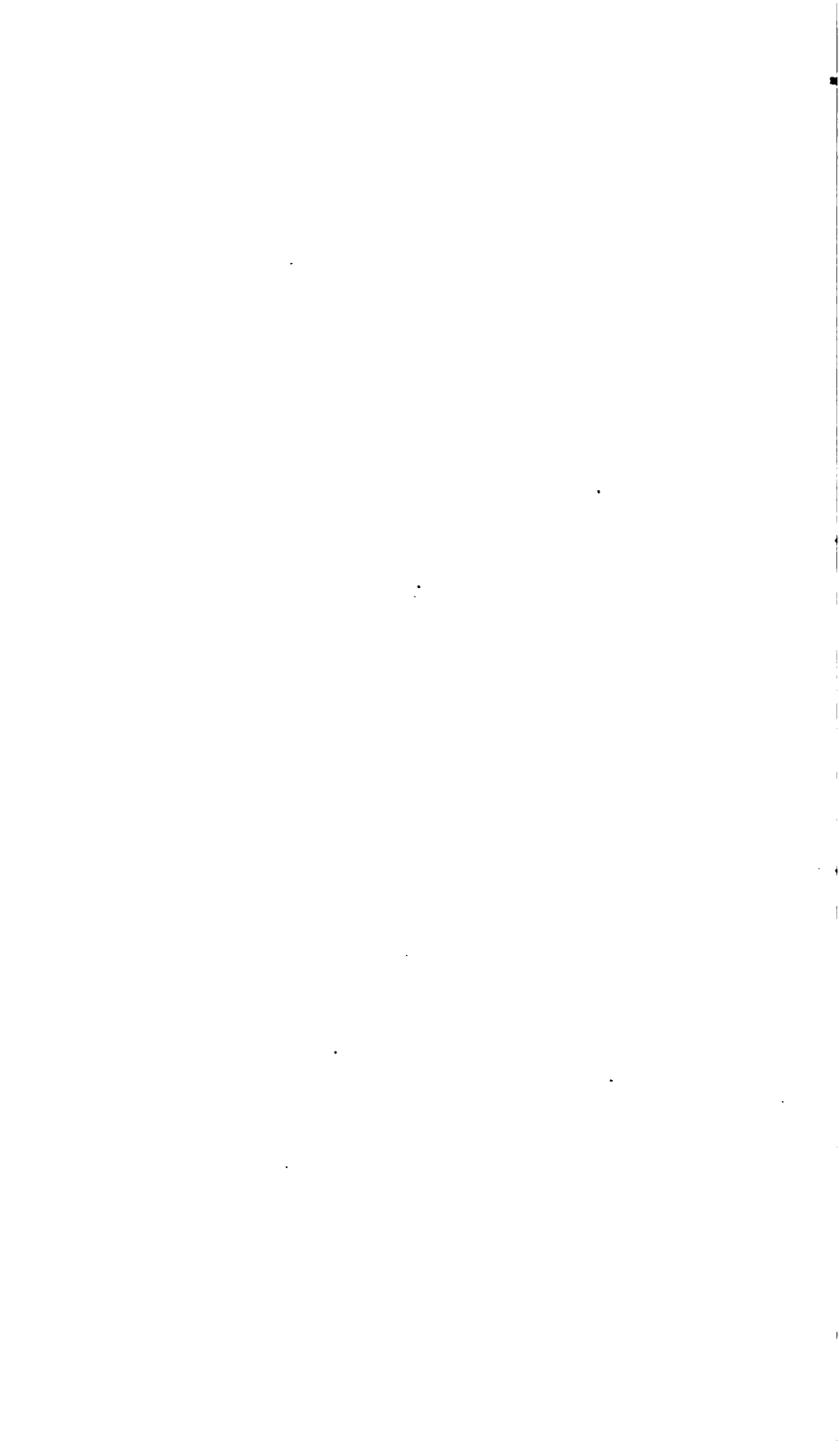
10. REVOCATIONS PRO TANTO either alter the quality of the estate, or diminish the quantity of the thing devised. *Id.*
11. CONVEYANCE OF PART OF PROPERTY DEVISED is a revocation *pro tanto* only. *Id.*

WITNESSES.

See EVIDENCE, 5, 7, 15.

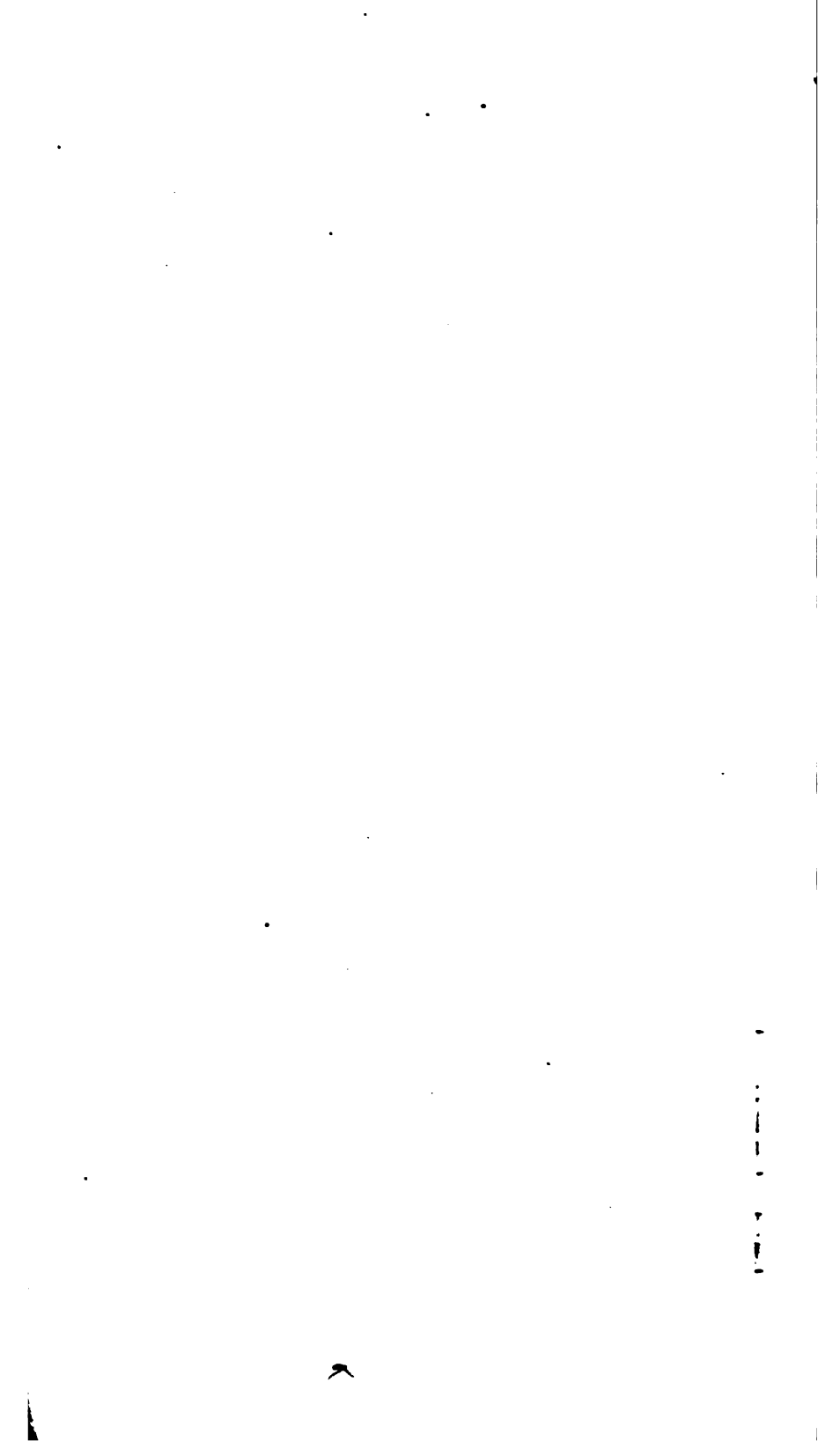
WORDS.

THE WORD "MAY" means must, or shall, only in cases where the public interest and rights are concerned, or where the public or third persons have a claim *de jure* that the power should be exercised; or where something is directed to be done for the sake of justice or the public good. *Malcolm v. Rogers*, 484.











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